PIETY AND PREJUDICE: FREE EXERCISE EXEMPTION FROM LAWS PROHIBITING SEXUAL ORIENTATION DISCRIMINATION

DAVID B. CRUZ*

INTRODUCTION

An increasing number of American municipalities, counties, and states are enacting civil rights statutes forbidding discrimination on the basis of sexual orientation. Nine states and the District of Columbia now have laws that protect lesbian, gay, and bisexual persons[1] in various fields, including credit, education, public accommodations, public and private employment, or union privileges.[2] Litigation over these laws has followed soon after their passage. In particular, the equality of opportunity and access that these laws promise to gay citizens has led to conflicts with some religious adherents who assert that their faith compels discrimination against non-heterosexuals. Where these laws do not explicitly exempt[3] religiously motivated discrimina-

* B.A., B.S., University of California, Irvine, 1988; M.S., Stanford University, 1991; J.D., New York University School of Law, 1994. To Marsha Wenk and Lisa Glick Zucker, current and former directors of the ACLU-NJ, I am indebted for the idea for this Note; although they might not all realize it, I have benefited from conversations with and the comments of Eric Brenner, Tanya Coke, Josh Davis, Christopher Eisgruber, Amybeth Garcia-Bokor, Marci Hamilton, Christopher Meade, Lourdes Rosado, Josh Rubin, Lawrence Sager, and Joe Saunders; I am especially grateful for the insight and unflagging support of William Nelson; and without the love and support of my family—particularly Felice Greene, to whose memory this Note is dedicated, and Steven Greene—and the contributions of the editors of the Law Review, my work would not have seen print. Of course, none of these good people is chargeable with any of the Note's shortcomings, for which I alone am responsible.

[1] When discussing sexual orientation, this Note employs forms of the terms *lesbian*, *gay*, and *bisexual*. Any use of one or a combination of these is meant to embrace all those who might be described by any of the terms. Additionally, the analysis may in some respects apply to transgendered and transsexual persons, although this Note does not address these particulars.

[2] See National Gay & Lesbian Task Force, Lesbian and Gay Rights in the U.S. 1-3 (1993) [hereinafter NGLTF]; see also text accompanying notes 20-26 infra.

[3] Civil rights laws often exempt religious organizations from coverage in certain activities. See, e.g., Cal. Lab. Code § 1102.1(b)(2) (West Supp. 1995) ("'Employer' as used in this chapter [prohibiting sexual orientation discrimination in employment] does not include a religious association or corporation not organized for private profit, whether incorporated as a religious or public benefit corporation."); Mass. Gen. Laws Ann. ch. 151B, § 4(15) (West 1982) (exempting from employment discrimination provisions "any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, [that] limit[s] admission to or giv[es] preference to persons of

tion,[4] they are subject to challenge on the grounds that they run afoul of the first amendment's guarantees of religious freedom.[5]

In fact, a number of major religion-based challenges to civil rights laws have reached the courts in recent years. A Catholic university interposed a religious freedom defense to a suit by a gay student group that had protested denial of university recognition under the District of Columbia's civil rights law.[6] Landlords in Alaska, California, Minnesota, and Massachusetts have claimed that guarantees of religious freedom forbid the state from requiring them to rent to unmarried couples under laws forbidding marital status discrimination in rental or sales of housing.[7] Hawaii's law banning sexual orientation

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the same religion or denomination or [that] make[s] such selection as is calculated by such organization to promote the religious principles for which it is established or maintained."); N.J. Stat. Ann. 10:5-5(*l*) (1993) (exempting "any educational facility operated or maintained by a bona fide religious or sectarian institution" from scope of state antidiscrimination statute). In addition, small employers or live-in landlords of few units are also generally excluded from the scope of such antidiscrimination laws. See, e.g., 42 U.S.C. § 2000a(b)(1) (1988) (defining public accommodations to include establishments providing lodging to transient guests, exempting proprietor-occupied facilities with five or fewer rooms); id. § 2000e(b) (1988) (defining "employer" to mean employer of 15 or more employees); Cal. Lab. Code § 1102.1(b)(1) (West Supp. 1995) (definition of covered "employer" does not include those employing fewer than five individuals).

[4] This Note generally refers to "religiously motivated" (or "religiously based") discrimination or conduct to avoid the ambiguity of the phrase "religious discrimination." The phraseology should not be taken to suggest that discriminatory conduct is somehow a "lesser" part of someone's religion than prayer, fasting, meditation, or any other observance. Nor should it be interpreted as disputing that "religious conduct is never divorced from religious belief." Marci A. Hamilton, The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct, 54 Ohio St. L.J. 713, 771 (1993).

[5] Indeed, although not writing about free exercise issues, one scholar has predicted that "discrimination on the basis of sexual orientation promises to be one of the most important issues in constitutional law." Cass R. Sunstein, Homosexuality and the Constitution, 70 Ind. L.J. 1, 27 (1994).

[6] See Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 39 (D.C. 1987) (en banc) (requiring provision of tangible services to, but not official recognition or endorsement of, student group).

[7] See Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280 (Alaska), cert. denied, 115 S. Ct. 460 (1994) (finding no violation of landlord's right to religious freedom); Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 406 (Cal. Ct. App.) (exempting religious landlord from state statute prohibiting marital status discrimination), modified on denial of rehearing, 1994 Cal. App. LEXIS 649 (Cal. Ct. App. June 23, 1994), review granted and opinion superseded, 880 P.2d 111 (Cal. 1994); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 46 (Cal. Ct. App. 1991) (same), review granted and opinion superseded, 825 P.2d 766 (Cal. 1992), appeal dismissed, 859 P.2d 671 (Cal. 1993); Attorney General v. Desilets, 636 N.E.2d 233, 241 (Mass. 1994) (reversing grant of summary judgment for defendants asserting free exercise defense to suit for refusal to rent to unmarried couple in violation of state antidiscrimination statute); State ex rel. Cooper v. French, 460 N.W.2d 2, 6 (Minn. 1990) (holding that state antidiscrimination statute did not cover landlord who refused to rent house to unmarried couple for religious reasons).

discrimination in employment was challenged in federal district court as violating the free exercise clause of the United States Constitution.[8] And the sexual orientation provisions of New Jersey's Law Against Discrimination[9] have been facially challenged in federal court by the Orthodox Presbyterian Church.[10]

Few courts or legal scholars have yet systematically considered whether or to what extent religious belief warrants constitutional exemption from laws that proscribe discrimination on the basis of sexual orientation.[11] Resolution of the kinds of challenges described above requires courts to engage in careful analysis of conflicting rights: the religious freedom of those whose sincerely held beliefs[12] lead them to discriminate, and the right of gay and lesbian people to be free from discrimination where civil rights laws are in force. In the balance hangs the power of states to legislate to prevent individual and social harms.

This Note attempts to discern some of the limits of both religious autonomy and state authority in this area: To what extent may states enforce civil rights in private markets of credit, employment, and

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These cases are germane here because under the current laws of all states, same-sex couples are necessarily unmarried. See Baehr v. Lewin, 852 P.2d 44, 56, as clarified on grant of reconsideration in part by 875 P.2d 225 (Haw. 1993). In Hawaii, however, litigation currently in progress may change this. In *Baehr*, the Hawaii Supreme Court held that the state's statute restricting marriage to mixed-sex couples constituted sex discrimination and must survive strict scrutiny in order to comport with the state's constitution. Id at 68. The case is now pending before the trial court on remand.

8 Voluntary Ass'n of Religious Leaders, Churches, & Orgs. v. Waihee, 800 F. Supp. 882, 884 (D. Haw. 1992) (dismissal on ripeness grounds, not merits).

9 N.J. Stat. Ann. §§ 10:5-1 to -42 (1993).

10 Presbytery of Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1458 (3d Cir. 1994) (affirming dismissal on ripeness grounds against institutional plaintiff but reversing as to individual plaintiff).

11 But see generally Richard F. Duncan, Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom, 69 Notre Dame L. Rev. 393 (1994) (arguing that laws that proscribe discrimination on basis of sexual orientation should not be enforced against religiously motivated actors). For additional brief discussion of this issue, see, e.g., Shelley K. Wessels, The Collision of Religious Exercise and Governmental Nondiscrimination Policies, 41 Stan. L. Rev. 1201, 1201, 1203, 1216-17, 1224, 1227-31 (1989) (considering two cases and one hypothetical about religious claims for exemption from laws forbidding discrimination on basis of sexual orientation).

12 While "false" claims of religious motivation for discrimination are perhaps inevitable, for purposes of analysis this Note assumes that religious belief in the propriety of such discrimination is sincere, and that free exercise conflicts with legal protections for lesbians, gay men, and bisexuals are therefore genuine. The analysis need not and does not presuppose that religiously motivated discrimination on the basis of sexual orientation is "a product of *unthinking* prejudice and hostility." Sunstein, supra note 5, at 28 (emphasis added). However, while the discussion makes no attempt to recast any assertion of piety into one of prejudice, neither does it posit that "bias and sincerity are mutually exclusive." Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination, 69 N.Y.U. L. Rev. 197, 282 (1994).

housing where religious convictions are opposed? Conversely, how much autonomy may religious adherents or organizations claim for themselves when their convictions lead them to violate civil rights laws? These questions are to a large degree independent of the identity of the class discriminated against; indeed, similar religious objections greeted an earlier generation of civil rights statutes prohibiting racial and sex discrimination.[13]

This Note, however, focuses on the potential clash between religious belief and legislation proscribing sexual orientation discrimination on the assumption that it poses the strongest challenge to the authority of states to prevent discriminatory harms. The reason for this assumption is that the consensus on the propriety of legal protections for gays and lesbians is decidedly less settled than for racial minorities or women. Since *Bowers v. Hardwick*[14]—where the Supreme Court determined that the penumbral right of privacy embodied in the fourteenth amendment's due process clause did not prevent a state from prohibiting same-sex intercourse—the legal and constitutional status of gay men and lesbians has been a matter of no little controversy.[15] Although the ruling in *Hardwick* does not foreclose a state's authority to enact civil rights protections for lesbians and gay men,[16]

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[13] See, e.g., EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272, 1279 (9th Cir. 1982) (rejecting free exercise challenge to Title VII's prohibition of sex discrimination); Brown v. Dade Christian Sch., Inc., 556 F.2d 310, 312 (5th Cir. 1977) (rejecting free exercise challenge to prohibition of racial discrimination in 42 U.S.C. § 1981 (current version at 1988 & Supp. V 1993)), cert. denied, 434 U.S. 1063 (1978).

[14] 478 U.S. 186, 189-91 (1986).

[15] Compare, e.g., Watkins v. United States Army, 875 F.2d 699, 724-28 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment) (arguing that sexual orientation is suspect classification under equal protection clause), cert. denied, 498 U.S. 957 (1990), with High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (holding sexual orientation classification to be neither suspect nor quasi-suspect and thus subject only to rational basis review) and Steffan v. Aspin, 8 F.3d 57, 62-63 (D.C. Cir. 1993) (leaving open question whether sexual orientation is suspect classification), rev'd sub nom. Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994).

[16] Any argument that *Hardwick* forecloses states from enacting legislation forbidding discrimination on the basis of sexual orientation must rely on an overly broad reading of the decision.

Hardwick presented a fourteenth amendment due process challenge to Georgia's antisodomy law. 478 U.S. at 191. Reading facts not in the record into the case, see Respondent's Petition for Rehearing at 2-3, *Hardwick* (No. 85-140), the Court framed the issue before it narrowly: Is there a fundamental, substantive due process right to commit homosexual sodomy? *Hardwick*, 478 U.S. at 190. Adopting the standard formulation of the substantive due process inquiry as whether the putative right was "implicit in the concept of ordered liberty" or a liberty "deeply rooted in this Nation's history and tradition," id. at 194, the Court concluded that the right to commit homosexual sodomy was not a fundamental liberty, and it therefore upheld Georgia's law. Id. at 191, 196.

The differences between the situation in *Hardwick* and that at issue in this Note are substantial. The Georgia law challenged in *Hardwick* did not prohibit discrimination on

the decision is part of an overall legal climate that may favor the granting of religious exemptions from sexual orientation antidiscrimination laws.

Part I of this Note surveys current laws banning discrimination on the basis of sexual orientation and briefly examines the authority of states to pass such legislation. Part II analyzes a number of free exercise decisions and suggests that the range of activities potentially subject to regulation by civil rights laws usefully may be divided into three zones.

At one end is a zone of commercial affairs, in which the government's regulatory authority is supreme. Here, the free exercise clause does not privilege religious motivation over the government's authority. At the other end is a zone of religious activities, involving transmission of doctrine through group association and spoken or printed word. In this zone the state is devoid of legislative competence, save when these religious activities threaten dire but collateral harms. Here, government must measure its regulation and the potential harm addressed against the compelling state interest standard.[17]

The region between these two zones—the analytical focus of this Note—includes activities with both commercial and religious aspects. These mixed activities are the ones likely to raise the most difficult conflicts for courts, for they have been subject to varying degrees of

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the basis of sexual orientation; it was a criminal statute prohibiting certain sexual practices. The contested issue was therefore not the existence vel non of state power to protect sexual minorities from discrimination, nor the constitutionality of any such efforts, but rather the extent to which the penumbral constitutional right of privacy limits state authority. As Judge Robert Norris wrote in a case involving a claim that a gay man had been denied the equal protection of the laws, "the driving force behind *Hardwick* is the Court's ongoing concern with the expansion of rights under substantive due process, not an unbounded antipathy toward a disfavored group." *Watkins*, 875 F.2d at 720 (Norris, J., concurring). In fact, *Hardwick* affirmed the police power of the state. See 478 U.S. at 196-97 (Burger, C.J., concurring). Thus, since free exercise challenges to antidiscrimination laws contest that power, *Hardwick*—if applicable at all—may actually undercut such claims for exemption. And, as Justice Frankfurter noted almost 50 years ago, "[c]ertainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of non-discrimination beyond that which the Constitution itself exacts." Railway Mail Ass'n v. Corsi, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring).

[17] The strict scrutiny of traditional equal protection doctrine holds, for example, that racial classifications are constitutional only if they are "necessary" for a "compelling state interest." See, e.g., note 326 infra; see generally Gerald Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). In the case of claims that governmental actions violate the free exercise clause, a similar form of strict scrutiny also involving compelling state interest analysis is used. See, e.g., Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 883 (1990) ("[G]overnmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.").

governmental regulation. This irregularity of treatment is due in part to the difficulty of characterizing activities that share attributes of both the commercial and religious spheres, as well as to tensions within the Supreme Court's free exercise jurisprudence itself.

This tripartite taxonomy helps to articulate an understanding of two important developments in free exercise law discussed in Part III: the landmark 1990 decision in *Employment Division, Department of Human Resources v. Smith*[18] and the Religious Freedom Restoration Act of 1993 (RFRA).[19] Both *Smith* and RFRA may determine the extent to which government must exempt religion from regulation in this middle zone of religiously permeated commercial activities.

I
LAWS PROHIBITING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

To date, nine states—California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Rhode Island, Vermont, and Wisconsin—and the District of Columbia have enacted statutes prohibiting sexual orientation discrimination in one or more of the following areas: credit, education, housing, public accommodations, private or public employment, or union practices.[20] An additional eleven states have banned sexual orientation discrimination in governmental employment.[21] And more than one hundred municipalities and counties have their own legal protections against various forms of discrimination on the basis of sexual orientation.[22]

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[18] 494 U.S. 872 (1990).

[19] Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993)).

[20] See Cal. Lab. Code § 1102.1 (West Supp. 1995); Conn. Gen. Stat. Ann. §§ 46a-81a to -81r (West Supp. 1994); D.C. Code Ann. §§ 1-2502, 1-2503 (1981); Haw. Rev. Stat. §§ 378-1 to -3 (Supp. 1992); Mass. Gen. Laws Ann. ch. 151B, §§ 3-4 (West 1982); Minn. Stat. Ann. § 363 (West Supp. 1995); N.J. Stat. Ann. §§ 10:5-5, 10:5-12 (West 1993); Act of May 22, 1995, chs. 34-37, 28-5, 11-24 & 28-5.1, R.I. H.B. No. 6678 (civil rights); Vt. Stat. Ann. tit. 1, § 143 (Supp. 1994), tit. 9, §§ 4503-4504 (1993), tit. 21, § 495 (Supp. 1994); Wis. Stat. Ann. §§ 101.22, 111.32 (West 1988).

[21] Illinois, Louisiana, Maryland, Michigan, Minnesota, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, and Washington. See NGLTF, supra note 2, at 1-3.

[22] Mireya Navarro, Gay Rights Battle Flares in Florida, N.Y. Times, Dec. 12, 1994, at B8. These jurisdictions include: Phoenix and Tucson, AZ; Berkeley, Cathedral City, Cupertino, Davis, Hayward, Laguna Beach, Long Beach, Los Angeles, Mountain View, Oakland, Palo Alto, Riverside, Sacramento, San Diego, San Francisco, San Jose, Santa Barbara, Santa Cruz, Santa Monica, West Hollywood, Alameda County, San Mateo County, and Santa Barbara County, CA; Hartford, New Haven, and Stamford, CT; Key West, Tampa, West Palm Beach, Hillsborough County, and Palm Beach County, FL; Atlanta, GA; Honolulu, HI; Champaign, Chicago, Evanston, Oak Park, Urbana, and Cook County, IL; Ames and Iowa City, IA; New Orleans, LA; Portland, ME; Baltimore,

Generally, these laws modify previously enacted prohibitions on racial, sexual, and religious discrimination, most of which closely track the Civil Rights Act of 1964.[23] Wisconsin's antidiscrimination statute,[24] the first state-wide law prohibiting discrimination on the basis of sexual orientation, is representative. Section 101.22(1) prohibits discrimination in housing on the basis of "sex, race, color, sexual orientation . . . , handicap, religion, national origin, sex or marital status . . . , age or ancestry."[25] Section 111.321-22 makes it illegal for an "employer, labor organization, employment agency, licensing agency or other person" to refuse to "hire, employ, admit or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment" because of the individual's sexual orientation.[26] Section 101.22(9) prohibits discrimination in "the full and equal enjoyment of" or provision of "services or facilities in any public place of accommodation or amusement."[27]

Laws such as these protect the civil rights of gay Americans. Absent bans on employment discrimination, the at-will employment doctrine permits employers in most states to fire employees for being gay, or even upon suspicion that an employee might be gay.[28] No illegal or offensive conduct of any nature is required. Similarly, enterprises that reserve the right to refuse to do business with anyone may, in the absence of prohibitions on sexual orientation discrimination, invoke that right to deny gay people service at a restaurant, admission to an

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Gaithersburg, Rockville, Howard County, and Montgomery County, MD; Amherst, Boston, Cambridge, Malden, and Worcester, MA; Birmingham, Ann Arbor, Detroit, East Lansing, Flint, Saginaw, and Ingham County, MI; Marshall, Minneapolis, St. Paul, and Hennepin County, MN; Kansas City, MO; Essex County, NJ; Alfred, Brighton, Buffalo, East Hampton, Ithaca, New York, Rochester, Syracuse, Troy, Watertown, Suffolk County, and Tompkins County, NY; Chapel Hill and Raleigh, NC; Columbus, Dayton, Yellow Springs, and Cayahoga County, OH; Portland, OR; Harrisburg, Lancaster, Philadelphia, Pittsburgh, and Northampton County, PA; Minnehaha County, SD; Austin and Houston, TX; Salt Lake County, UT; Burlington, VT; Alexandria and Arlington County, VA; Olympia, Pullman, Seattle, Clallam County, and King County, WA; Madison, Milwaukee, and Dane County, WI. See NGLTF, supra note 2, at 1-3.

23 Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 28 & 42 U.S.C.).

24 Wis. Stat. §§ 101.22-.222, 111.31-.395 (1989) (enacted 1981).

25 Id. § 101.22(1).

26 Id. § 111.321-22.

27 Id. § 101.22(9).

28 The at-will employment doctrine provides that in the absence of controlling statutes or contracts, both employers and employees are free to sever unilaterally the employment relationship for any reason or for no reason. See generally, e.g., Mack A. Player, Employment Discrimination Law 1-3 (1988); Charles A. Sullivan et al., Employment Discrimination 383-85 (2d ed. 1988).

amusement park, or membership in a health club.[29] Moreover, landlords in jurisdictions without antidiscrimination laws may refuse to rent, lease, or sell houses, apartments, or other lodging to gay men and lesbians.[30]

States and localities that have enacted civil rights protections for gay men and lesbians can claim support for their authority to do so from a variety of sources. Although many of the Constitution's guarantees of equality flow from the equal protection clause of the fourteenth amendment,[31] ratification of states' power to enact antidiscrimination legislation may be located more directly in the tenth amendment.[32] States need not invoke a specific constitutional clause in order to enact civil rights laws protecting equality: This authority stems directly from their police power, which the tenth amendment recognizes is preserved under the Constitution.[33] This principle, largely undebated today,[34] has been widely recognized for over a century.[35]

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29 See Nan D. Hunter et al., The Rights of Lesbians and Gay Men: The Basic ACLU Guide to a Gay Person's Rights 70 (3d ed. 1992).

30 See id. at 64-65; see also Kramarsky v. Stahl Management, 401 N.Y.S.2d 943, 945 (N.Y. Sup. Ct. 1977) ("Absent a supervening statutory prescription, a landlord is free to do what he wishes with his property, and to rent or not rent to any given person at his whim.").

31 "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

32 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

33 See, e.g., Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919) ("That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true."); see also, e.g., O'Rourke v. City of Norman, 875 F.2d 1465, 1469 (10th Cir. 1989) ("It is axiomatic that the states, acting pursuant to the Tenth Amendment's 'police powers,' define state criminal law."); United States v. Certain Lands in Louisville, 78 F.2d 684, 689 (6th Cir. 1935) (Allen, J. dissenting) ("[T]he police power is reserved to the states under the Tenth Amendment."); Stefanie Lee Black, Comment, Competing Interests in the Fetus: A Look into Parental Rights After *Planned Parenthood v. Casey*, 28 Wake Forest L. Rev. 987, 1022 n. 280 (1993) ("The police power is a function of the Tenth Amendment which allows the state to restrain the liberty and property of the individual to protect the public welfare.").

34 See, e.g., United States Power Squadrons v. State Human Rights Appeal Bd., 452 N.E.2d 1199, 1205 (N.Y. 1983) ("It is much too late in the day to challenge the constitutionality of civil rights legislation generally.").

35 See, e.g., Donnell v. State, 48 Miss. 661, 682 (1873) (upholding state statute prohibiting racial discrimination in public accommodations); Joseph v. Bidwell, 28 La. Ann. 382, 383 (La. 1876) (upholding constitutionality of state constitutional provision supplemented by acts of the legislature of Louisiana, passed in 1870 and 1871, requiring that "all persons shall enjoy equal rights and privileges upon . . . all places . . . of public resort").

A. Early Articulation of State Authority To Proscribe Discrimination

A nineteenth-century case from New York provides an early example of this recognition of state authority to enact civil rights protection under state police powers. In 1888, the Court of Appeals of New York decided *People v. King*,[36] in which it upheld the constitutionality of a state law criminalizing racial discrimination in public education and accommodations.[37] King, the owner of a roller skating rink, appealed his conviction for refusing to admit three African American men who sought to attend an advertised exhibition on opening night.[38] The defendant challenged the constitutionality of New York's public accommodations law, claiming that it regulated matters beyond the legitimate authority of the state.[39] The court rejected this contention and affirmed the conviction.[40]

In its opinion, the court explained that New York's enactment of a public accommodations law was an exercise of "what, for lack of a better name, is called the 'police power of the state.'"[41] Admitting that the police power is "incapable of exact definition,"[42] the court nonetheless ventured the following: "Police power" is a general rubric "cover[ing] a wide range of particular unexpressed powers reserved to the state, affecting freedom of action, personal conduct, and the use and control of property."[43]

In order to determine whether the challenged public accommodations law fell within the scope of the police power, the court looked to the purpose of the provision, one designed to guarantee equal access to public facilities for African Americans:[44]

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36 18 N.E. 245, 249 (N.Y. 1888).

37 The relevant section of the New York penal code provided that "no citizen of this state can by reason of race, color, or previous condition of servitude be excluded from the equal enjoyment of any accommodation, facility, or privilege furnished by inn-keepers or common carriers, or by owners, managers, or lessees of theaters or other places of amusement, by teachers and officers of common schools and public institutions of learning, or by cemetery associations." Id. at 245.

38 Id.

39 Id. at 246.

40 Id. at 249.

41 Id. at 246.

42 Id.

43 Id. at 247. The court offered a broad outline of its use:

> By means of this power the legislature exercises a supervision over matters involving the common weal, and enforces the observance by each individual member of society of the duties which he owes to others and to the community at large. It may be exerted whenever necessary to secure the peace, good order, health, morals, and general welfare of the community . . . .

Id. at 246.

44 Id. at 247.

> Both justice and the public interest concur in a policy which shall elevate [African Americans] as individuals, and relieve them from oppression or degrading discrimination, and which shall encourage and cultivate a spirit which will make them self-respecting, contented, and loyal citizens, and give them a fair chance in the struggle of life . . . .[45]

While the court noted that "[i]t is of course impossible to enforce social equality by law,"[46] it concluded that the legislature need not justify the contested statute with such an intention. Instead, it was enough that the law addressed some individual or social harms:

> [T]he law in question simply insures to [African American] citizens the right to admission, on equal terms with others, to public resorts, and to equal enjoyment of privileges of a quasi public character. The law in question cannot be set aside, then, because it has no basis in the public interest; and the promotion of the public good is the main purpose for which the police power may be exerted . . . .[47]

The New York court also considered and rejected a claim that the public accommodations law, while within the general authority of the state, was unconstitutional because it invaded the constitutionally protected property rights of the defendant.[48] The court, quoting a United States Supreme Court case upholding an Illinois law regulating licensing and other fees for grain elevators,[49] found that the "quasi-public" character of the accommodations at issue gave the state the right to regulate them in the public interest.[50] The Court of Appeals affirmed that the police power encompassed regulation of quasi-public entities for the prevention of discrimination, and therefore the basis for the prohibited discrimination was irrelevant.[51]

The reasoning of *People v. King* also applies to states' authority to enact civil rights laws forbidding sexual orientation discrimination. These laws further the equality values manifested in the equal protection and due process clauses of the fourteenth and fifth amendments.[52] But less abstractly they address harms to individuals and to

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45 Id. at 248.

46 Id.

47 Id.

48 Id. at 248-49.

49 Munn v. Illinois, 94 U.S. 113 (1876).

50 See *King*, 18 N.E. at 248-49 ("'Where . . . one devotes his property to a use in which the public have an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.'" (quoting *Munn*, 94 U.S. at 126)).

51 See id. at 249. This reasoning arguably reduces the importance of the court's earlier invocation of the principles and history of the Civil War amendments. See id. at 247-48.

52 The fourteenth amendment, on its face, contains an equal protection component. See note 31 supra (text of equal protection clause). The Supreme Court has also found an

society flowing from discrimination in the use of quasi-public facilities. As the *King* court wrote over one hundred years ago, "the promotion of the public good is the main purpose for which the police power may be exerted."[53] Thus, a government may rightly conclude that eliminating discrimination against gay men and lesbians in the area of civil rights serves this end.

B. The Constitutional Commitment to Antidiscrimination

Although no federal statutes or Supreme Court cases directly address the harm of discrimination on the basis of sexual orientation,[54] the Court has spoken frequently and eloquently about the Constitution's general stance on discrimination. In *Norwood v. Harrison*,[55] the Supreme Court held unconstitutional the State of Mississippi's decision to lend textbooks to private schools that discriminated on the

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equal protection component in the fifth amendment. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (finding equal protection component in due process clause of fifth amendment); see also Regan v. Taxation with Representation, 461 U.S. 540, 542 n.2 (1983) (reaffirming same); Schweiker v. Wilson, 450 U.S. 221, 226 n.6 (1981) ("[T]he Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment.").

[53] *King*, 18 N.E. at 248.

[54] The Civil Rights Act of 1871, 42 U.S.C. §§ 1981(a)-(c) (1988 & Supp. V 1993), provides various causes of action for infringements "under color of state law" of rights guaranteed by the Constitution and laws of the United States. These provisions may, under some circumstances, offer lesbians and gay men some protection against discrimination by state officials in employment, housing, or public accommodations. The most plausible way in which such discrimination might constitute a violation of federal law would be under the due process or equal protection clauses of the Constitution. An only slightly generous reading of Bowers v. Hardwick, 478 U.S. 186 (1986), may, however, eliminate reliance on the due process clause. See discussion at note 16 supra. Moreover, unless a class defined by sexual orientation were to constitute a protected or quasi-protected class under equal protection analysis (unless a "fundamental right" were at issue), the state would need to meet only the minimal requirement of a rational basis for its discriminatory actions to pass constitutional muster. See, e.g., Clark v. Jeter, 486 U.S. 456, 461 (1988) (summarizing equal protection doctrine and citing cases); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-42 (1985) (briefly reviewing standards of review). Concerning the question whether sexual orientation constitutes a suspect classification, see generally Renee Culverhouse & Christine Lewis, Homosexuality as a Suspect Class, 34 S. Tex. L. Rev. 205 (1993); Denise Dunnigan, Constitutional Law: A New Suspect Class: A Final Reprieve for Homosexuals in the Military?, 42 Okla. L. Rev. 273 (1989); Janet E. Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 UCLA L. Rev. 915 (1989); John C. Hayes, The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After *Bowers v. Hardwick*, 31 B.C. L. Rev. 375 (1990).

Only one federal statute has expressly forbidden discrimination on the basis of sexual orientation. The 1994 act of Congress that provided emergency earthquake relief assistance to California specified that the distribution of aid was to be made without regard to, inter alia, the sexual orientation of the recipients. See Emergency Supplemental Appropriations Act of 1994, Pub. L. No. 103-211, § 403(5), 1994 U.S.C.C.A.N. (108 Stat.) 3.

[55] 413 U.S. 455 (1973).

basis of race, even though the state provided texts to all students in both public and private schools.[56] The Court stated that "although the Constitution does not proscribe private bias, it places no value on discrimination. . . . Invidious private discrimination may be characterized as a form of exercising freedom . . . protected by the First Amendment, but it has never been accorded affirmative constitutional protections."[57]

The Supreme Court has denounced discrimination in other contexts as well. Speaking with regard to sex discrimination, the Court explained in *Roberts v. United States Jaycees*[58] why the Jaycees, although nominally a "members-only" association, could be forced by a state civil rights law to admit women to their all-male ranks:

> [A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.[59]

When someone discriminates in public accommodations, the Court explained, "[t]hat stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race."[60]

Thus, the harm to the victim, including the perpetuation of inferior status, forms a central rationale for antidiscrimination laws. Certainly lesbians and gay men feel stigmatized and suffer from "the denial of equal opportunities" whenever someone refuses them education, housing, employment, or any of the other goods, services, and opportunities protected by civil rights laws.

Precisely because of this personal injury flowing from discrimination, "the state interest in assuring equal access [is not] limited to the provision of purely tangible goods and services. A State enjoys broad authority to create rights of public access on behalf of its citizens."[61]

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[56] Id. at 456, 470-71.

[57] Id. at 469-70.

[58] 468 U.S. 609 (1984).

[59] Id. at 628 (citations omitted).

[60] Id. at 625; see also Congress's most recent effort to protect the disabled from similar harms by codifying nondiscrimination provisions in the Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified in scattered sections at 29, 42, & 47 U.S.C.).

[61] *Roberts*, 468 U.S. at 625 (citation omitted).

This extends to the power to adopt a

> functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct. This expansive definition reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.[62]

These justifications for laws prohibiting race and sex discrimination also apply to ones prohibiting sexual orientation discrimination.[63] Gay men and lesbians have suffered from "barriers to economic advancement," at least when their sexual orientation has become known.[64] Moreover, political and social integration remain problematic for many "uncloseted" gay Americans.

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[62] Id. at 625-26 (citation omitted).

[63] At least one commentator believes otherwise. See Wessels, supra note 11, at 1216-17 (arguing that state interests in banning sex/race discrimination are distinguishable from sexual orientation antidiscrimination statutes). Her analysis, however, is logically flawed. Wessels conflates the level of justification needed for a government's classification to survive judicial scrutiny in an equal protection challenge with the strength of governmental interest in eradicating discrimination based upon that classification. Although her conclusion that "even preventing sexual orientation discrimination may be a compelling state interest," id. at 1217, is correct, her base assumption is not. Government has a compelling interest in eradicating all forms of discrimination. In Roberts v. United States Jaycees, 468 U.S. 609 (1984), which addressed a first amendment challenge to a law prohibiting sex discrimination—the prevention of which Wessels thinks prima facie serves a less compelling interest than do laws forbidding racial discrimination—not only did the Supreme Court speak of the state's compelling interest in eradicating sex discrimination, see, e.g., id. at 623 ("We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."), but it also spoke generally about government's interest in eliminating *discrimination*, unmodified, see id. at 628 ("As we have explained, acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit.").

[64] See, e.g., Doe v. Casey, 796 F.2d 1508, 1524 (D.C. Cir. 1986) (denying reinstatement to CIA agent dismissed after presenting self as homosexual to CIA security officer), aff'd in part, rev'd in part on other grounds sub nom. Webster v. Doe, 486 U.S. 592 (1988); McConnell v. Anderson, 451 F.2d 193, 196 (8th Cir. 1971) (asserting that university's failure to hire librarian after media coverage of his attempt to marry another man was not arbitrary, unreasonable, or capricious); Lesbians, Gay Men, and the Law 243-47, 257 (William B. Rubinstein ed., 1993) (discussing employment discrimination against gay men and lesbians).

There are of course many differences between discrimination against African Americans and discrimination against lesbians, gays, and bisexuals. The most prominent of these differences may be the history of government-sanctioned enslavement of African Americans. The comparison is offered here for two reasons. First, the statutes that today protect gay men, lesbians, and bisexuals from discrimination are generally ones originally enacted in large part to protect African Americans. Second, discrimination in the provision of

In particular, American society currently includes individuals and organizations with religious objections to "homosexuals" or "homosexuality" who assert their religious beliefs to justify discrimination on the basis of sexual orientation.[65] Their claims parallel those of people who have invoked religious belief as a defense for racial discrimination. In cases like *Bob Jones University v. United States*,[66] however, the Supreme Court has found such justifications unavailing.[67] Certainly this does not mean that those who would discriminate against gay men and lesbians possess no measure of constitutionally protected autonomy. But it does demonstrate, as Part II makes clear, that legislatures may circumscribe freedom to discriminate in certain spheres.

In conclusion, states possess authority to enact antidiscrimination laws to prevent harms flowing from denials of publicly available goods or services on the basis of personal characteristics. Such harms exist when lesbians, gays, or bisexuals are the victims of discrimination. Hence, states may prohibit discrimination on the basis of sexual orientation where "public, quasi-commercial conduct" is involved. Moreover, as the following Part demonstrates, this governmental authority over commercial and quasi-commercial affairs is retained in large measure even where the constitutional protection of religion is invoked.

II
ZONES OF AUTHORITY

The first amendment to the Constitution declares, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[68] As the second disjunct—the free exercise clause[69]—suggests, these first words of the

publicly available goods and services is injurious and stigmatizing to both groups, and to the individuals within them.

65 See, e.g., Walker v. First Presbyterian Church, 22 Fair Empl. Prac. Cas. (BNA) 762, 765 (Cal. Super. Ct. 1980) (upholding termination of gay male church organist); Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 6-14 (D.C. 1987) (en banc) (prohibiting discrimination in provision of tangible benefits to gay and lesbian student group); Madsen v. Erwin, 481 N.E.2d 1160, 1164 (Mass. 1985) (upholding termination of lesbian writer by The Christian Science Monitor); Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784, 787-91 (Minn. Ct. App. 1985) (prohibiting religious discrimination against gay man in health club membership), aff'd without op., 389 N.W.2d 205 (Minn. 1986).

66 461 U.S. 574 (1983).

67 See id. at 603-04.

68 U.S. Const. amend. I.

69 This terminology is somewhat imprecise, for "there is one religion clause, not two." Richard J. Neuhaus, Contending for the Future: Overcoming the Pfefferian Inversion, 8 J.L. & Religion 115, 115 (1990). This point "is very important, both substantively and rhetorically. The conventional wisdom is that there are two religion clauses that must

Bill of Rights constitute a restriction on government that is largely aimed at ensuring religious freedom.[70] By virtue of the fourteenth amendment incorporation doctrine,[71] these provisions protect religious freedom from intrusions by state, as well as federal, government.[72]

As the Supreme Court has recently observed, there is no real dispute that the free exercise clause prohibits government from taking actions designed to deter people from holding or acting on religious beliefs as such.[73] At the very least, the free exercise clause contains a "fundamental nonpersecution principle"[74] that disables the government from passing laws that "discriminate[ ] against some or all religious beliefs or regulate[ ] or prohibit[ ] conduct *because* it is undertaken for religious reasons."[75] Accordingly, laws and governmental actions must be both formally neutral and generally applicable to comport with the free exercise clause.[76]

Rarely in America does government engage in overt, targeted suppression that would run afoul of the neutrality and general applicability requirements of the free exercise clause. More often government passes laws that disadvantage people of faith without expressly or intentionally targeting religion; civil rights laws that prohibit various forms of discrimination fall within this category. Under some circumstances, the Supreme Court has construed the free exercise clause to compel exemptions even from neutral, generally applicable laws.[77]

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somehow be 'balanced,' one against the other. But these provisions of the First Amendment are not against each other. Each is in service of the other." Id.

70 See, e.g., Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1516 (1990) (arguing that "the government is powerless and incompetent to determine what particular conception of the divine is authoritative").

71 See generally Akhil R. Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992).

72 See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that "[t]he fundamental concept of liberty embodied in" the fourteenth amendment includes "the liberties guaranteed by the First Amendment").

73 See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2240 (1993) (Souter, J., concurring in part and concurring in the judgment).

74 Id. at 2222.

75 Id. at 2226 (emphasis added).

76 See id. at 2242 (Souter, J., concurring in part and concurring in the judgment). But see Marci A. Hamilton, The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence, 29 Ga. L. Rev. 81, 129 (1994) (illustrating how *Lukumi* contemplates upholding some actions explicitly targeted at religion, where a compelling interest is served and least restrictive means are employed).

77 See, e.g., notes 160-79 and accompanying text infra (discussing Wisconsin v. Yoder, 406 U.S. 205 (1972)). But see Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 882 (1990) (holding that neutral and generally applicable criminal prohibition does not offend free exercise clause).

The question of when formally neutral laws need religious exemptions to avoid unconstitutionally prohibiting free exercise of religion, and when interference with religiously motivated conduct is a constitutionally permissible consequence of such laws, provokes sharp controversy.[78] The basic issue in such cases is how much extra "breathing room" government is constitutionally required to provide religious actors.

For example, precedents establish that a state that provides unemployment compensation payments only to people unable to find "suitable" work may not deny those benefits to Sabbatarians whose religious beliefs prevent them from holding otherwise "suitable" jobs.[79] Nor may the government prosecute parents for withdrawing their children from public schools prior to age sixteen when the family's religious community educates its children in a manner proven to make them self-sufficient.[80]

In other situations, the state may constitutionally (at least under current doctrine) apply formally neutral laws to all people, even when doing so restricts some individuals' ability to practice their religion freely in accordance with sincerely held beliefs. Precedent establishes that government may require *all* employers to pay social security taxes for employees, even when doing so violates one of the tenets of their faith.[81] The military may dictate a standard uniform for *all* personnel, even though this prevents, for example, Orthodox Jewish men from wearing the yarmulke, which their faith requires.[82] Government may *uniformly* prohibit the practice of polygamy, whether such practice is secular or religious in motivation.[83] Thus, a wide range of governmental interests may constitutionally overcome some assertions of religious freedom.

Yet no state court of last resort has directly addressed the problem of how to evaluate challenges to laws prohibiting sexual orientation discrimination brought on the ground that such laws infringe the

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[78] See, e.g, *Smith*, 494 U.S. 872, 890 (5-1-3 decision) (denying free exercise challenge to denial of unemployment benefits to participants in Native American Church ritual); Goldman v. Weinberger, 475 U.S. 503, 509-10 (1986) (5-4 decision) (denying free exercise challenge to military dress code regulation).

[79] See Part II.C.2 infra (discussing Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989), Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987), Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981), and Sherbert v. Verner, 374 U.S. 398 (1963)).

[80] See notes 160-79 and accompanying text infra (discussing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

[81] See notes 102-13 and accompanying text infra (discussing United States v. Lee, 455 U.S. 252, 260-61 (1982)).

[82] See *Goldman*, 475 U.S. at 509-10.

[83] See Reynolds v. United States, 98 U.S. 145, 166-67 (1878).

free exercise of religion.[84] Nor has the United States Supreme Court provided specific answers. The Court's free exercise jurisprudence does, however, offer guidance. This Part examines a nonexhaustive set of the Supreme Court's free exercise precedents, primarily those cases bearing on the quasi-public provision of goods and services.[85]

The cases discussed fall into three categories, or "zones" of precedent, differentiated by the loci of primary authority over different types of activities. Section A analyzes Supreme Court precedents establishing plenary governmental authority over quasi-commercial activities. Here, the free exercise clause poses no bar to state regulation of religious individuals or organizations that engage in quasi-commercial enterprises. Section B examines a number of cases defining a zone of religious autonomy with respect to activities involving the transmission, through group association and spoken or printed word, of religious belief and doctrine. Such activities are scrupulously protected under the free exercise clause. In this zone, the state is almost bereft of regulatory authority. Finally, Section C considers a number of cases that do not fall neatly into either polar extreme. Two types of cases are discussed in this Section. First is a series of religious education cases; these cases concern the intersection of, on the one hand, government's authority over the education of its citizens, and, on the other, doctrinal transmission, the survival of faiths, and religious pluralism. Second, this Section considers a group of cases dealing with the collision of governmental unemployment compensation requirements with the dictates of workers' religious beliefs. While the cases

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[84] But cf. State by Cooper v. French, 460 N.W.2d 2, 11 (Minn. 1990) (granting free exercise exemption from statute prohibiting marital status discrimination to sale of owner's former house in state with antifornication statute); State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 854 (Minn. 1985) (upholding law proscribing employment discrimination *on the basis of religion* against free exercise challenge by born-again Christian manager who believed that homosexuals were "antagonistic" to the Bible).

[85] Not included are a number of cases Justice Souter recently distinguished as involving "special reasons to defer to the judgment of the political branches," Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2246 n.5 (1993) (Souter, J., concurring in part and concurring in the judgment), such as free exercise challenges to prison or military regulations. See O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (prison work regulations preventing Muslim inmates from worshipping at appropriate times); Goldman v. Weinberger, 475 U.S. 503 (1986) (military dress regulations preventing Jewish men from wearing yarmulke). Also omitted are cases that involve "the Government['s] . . . conduct [of] its own internal affairs," Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 900 (1990) (O'Connor, J., concurring in the judgment), such as free exercise challenges to government construction projects or the use of social security numbers in administering benefits programs. See Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (paved road through federal land); Bowen v. Roy, 476 U.S. 693 (1986) (federal food stamp and AFDC programs). While these cases may contribute to a general understanding of the free exercise clause, their facts are sufficiently distinguishable from typical civil rights controversies as to render them of limited value to the analysis below.

in Section C are often invoked as support for a robust religious exemption doctrine, this Note argues that many of these cases are not truly exemption cases but instead turn on the basic antipersecution principle of the free exercise clause.

A. Governmental Authority to Regulate Commercial Activity

In its free exercise cases, the Supreme Court has emphatically affirmed the government's authority to regulate commercial affairs. This power is nearly absolute; time and again the Court has rejected free exercise challenges in the commercial world. Its decisions establish that the free exercise clause does not demand exemptions from regulation of commercial activities even when those activities are pursued for religious reasons and compliance with the law burdens the religious individual.

The "commercial zone" cases discussed in this Section show that laws forbidding discrimination on the basis of sexual orientation may be applied constitutionally to religious entities. Such statutes are facially neutral and generally applicable laws that protect an egalitarian public order, which, like health and safety regulations, are valid exercises of state police power in the zone of commercial activity.[86] A state may therefore require people of faith to comply with such antidiscrimination laws if they engage in minimally commercial activities within the stated scope of such laws.

The conclusion drawn from the analysis of these cases is that since most antidiscrimination laws operate in the realm of commercial activity, the constitutional guarantee of the free exercise of religion, in most circumstances, will provide no basis for exempting religiously motivated discrimination on the basis of sexual orientation.

1. Braunfeld v. Brown: *Sunday Closing Laws*

In *Braunfeld v. Brown,*[87] the Supreme Court considered a free exercise challenge to Sunday closing laws.[88] The Court's acknowledgment of government's paramount authority in regulating commercial affairs and its concomitant rejection of the religious claim for exemption supports the conclusion that in *most* contexts, civil rights laws will withstand constitutional challenge under the free exercise clause.

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[86] See discussion in Part I supra.

[87] 366 U.S. 599 (1961).

[88] In two cases decided the same day, Two Guys from Harrison-Allentown, Inc., v. McGinley, 366 U.S. 582 (1961), and McGowan v. Maryland, 366 U.S. 420 (1961), the Court curiously rejected equal protection and establishment clause challenges to such laws. *Two Guys*, 366 U.S. at 589-92 (no equal protection clause violation); *McGowan*, 366 U.S. at 425-28 (same); id. at 430-52 (no establishment clause violation).

In *Braunfeld*, two Orthodox Jewish men with retail businesses in Philadelphia brought an action to enjoin enforcement of Pennsylvania's Sunday closing law, which imposed monetary penalties for violations; they contended that the law infringed upon their right to free exercise of religion. After a specially convened three-judge district court ruled against them, the appellants argued before the Supreme Court that because their Sabbath beliefs required them to refrain from engaging in business from nightfall Friday to nightfall Saturday, the Sunday closing law imposed a constitutionally significant economic burden on them.[89]

The Court noted these substantial costs but upheld the law nonetheless. Invoking earlier free exercise cases including *Reynolds v. United States*,[90] which upheld a prohibition against polygamy, and *Cantwell v. Connecticut*,[91] which invalidated a licensing statute that acted as a prior restraint on dissemination of religious views, the Court distinguished between regulation of belief, over which the state has no authority, and regulation of conduct, which is within state power.[92] To determine whether the state possessed legislative authority over the regulated activity, the Court looked to the commercial character of the conduct at issue, not the religious motivations or circumstances of those engaging in it (nor the probable religious motivations of those enacting the statute): "[T]he Sunday law simply regulates *a secular activity* and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive."[93] The prospect that the appellants might well have to make "some financial sacrifice in order to observe their religious beliefs"[94] did not suffice to render the state's otherwise valid exercise of power unconstitutional as applied to Orthodox Jews.

Braunfeld suggests that the constitutionality of civil rights laws in the commercial zone should not turn upon whether the class protected is defined by race, gender, or sexual orientation, for the Court's analysis focused on the state's ability to regulate in this area, not on the precise degree to which the interest behind the law was compelling. The Court referred to the Sunday closing law as an example of "a general law within [the State's] power, the purpose and effect of which

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89 See *Braunfeld*, 366 U.S. at 600-01.

90 98 U.S. 145, 166 (1878).

91 310 U.S. 296, 303 (1940) (discussed at notes 132-58 and accompanying text infra).

92 See *Braunfeld*, 366 U.S. at 603-04.

93 Id. at 605 (emphasis added).

94 Id. at 606.

is to advance the State's secular goals."[95] In considering the abstract strength of the state's interest, the Court reiterated *Reynolds*'s holding that state laws "may reach people's actions when they are found to be in violation of important social duties or subversive of good order."[96] Civil rights laws, regardless of the types of discrimination they prohibit, establish antidiscrimination norms that constitute "important social duties" in the service of "good order."

The *Braunfeld* Court did consider whether other means of enforcing a public day of rest might be less economically burdensome for Sabbath observers[97] but concluded that granting exemptions "*might* well undermine the State's goal of providing a day that, *as best possible*, eliminates the atmosphere of commercial noise and activity."[98] Thus, while free exercise doctrine asks whether laws burdening religion might be served by less restrictive means, the analysis is appreciably less stringent in the commercial zone than it could be. Speculative but reasonably conceivable interference with the state's regulatory goals suffices to preserve the state's authority against religious challenge.[99]

In effect, then, the Supreme Court has held that where commercial activity is at issue, the free exercise clause generally does not interfere with state regulatory authority in any significant fashion.[100] A constitutional exemption was not granted in *Braunfeld* in spite of the fact that at least one of the appellants risked completely losing his capital investment in his business if he honored his Sabbath while complying with the Sunday closing law.[101] From this holding, it follows, for example, that landlords would presumably be unable to claim a free exercise right to exemption from a law prohibiting sexual orientation discrimination in housing: They would have to forsake discriminating or give up their apartment complexes for some other business endeavor.

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[95] Id. at 607; see also id. ("[W]e cannot find a State *without power* to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquillity." (emphasis added)).

[96] Id. at 603 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).

[97] See id. at 607-09.

[98] Id. at 608 (emphases added).

[99] Similarly, although the Court did not consider the possibility dispositive, it also noted the need for increased enforcement efforts if businesses were allowed a choice of days on which to close. Id. at 608.

[100] See id. at 601.

[101] Id. at 601, 609.

2. United States v. Lee: *Tax Laws*

The Supreme Court's focus on the commercial character of conduct was virtually dispositive in *United States v. Lee*,[102] in which the Court rejected a free exercise challenge brought by a member of the Old Order Amish against a federal tax. *Lee* indicates that commercial activity need only implicate minor economic effects for religious conduct to be subject to the same regulation as conduct without a religious motivation. It follows from *Lee* that religious convictions will generally offer no constitutional excuse for noncompliance with civil rights laws protecting lesbians, gay men, and bisexuals in commercial or quasi-commercial contexts, even when the regulation requires (or prohibits) conduct forbidden (or demanded) by the objectors' religious beliefs.

Edwin Lee was an Old Order Amish farmer and carpenter who employed a number of Amish workers for several years in the 1970s. Because they all believed that their religion barred contributions to and receipt of benefits from the social security system, Lee did not withhold required social security taxes from the wages he paid his employees. He also failed to pay his share of his employees' social security taxes. When the IRS presented Lee with a bill for past taxes due, he paid approximately one third of one percent and sued in federal court for a refund, arguing that the free exercise clause prevented collection of these taxes.[103]

A unanimous Supreme Court disagreed. The Court acknowledged that compelling Lee and his employees to make payments to the social security system forced them to violate their religious beliefs.[104] Nonetheless, it found the requirement constitutional.[105] As the Court bluntly put it: "[R]eligious belief in conflict with the payment of taxes affords no basis for resisting the tax."[106]

Chief Justice Burger's opinion reveals two different lines of reasoning undergirding the Court's holding. First, he seemed to suggest that the government's interest outweighed Lee's claim to religious liberty because of the practical impossibility of administering a social security system that provided "myriad exceptions flowing from a wide variety of religious beliefs."[107] America's tax system, the opinion declared, "could not function" if all taxes admitted exceptions when use

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102 455 U.S. 252 (1982).

103 See id. at 254-55.

104 Id. at 257.

105 Id. at 261.

106 Id. at 260.

107 Id. at 259-60.

of the funds conflicted with religious beliefs.[108] Because the Court could not distinguish in a principled manner between social security taxes and other kinds of taxes, Burger reasoned, Lee's claim to exemption from the social security tax must fail.[109]

This focus on the cumulative effects of granting an exemption would seem to support a general denial of free exercise exemptions to laws prohibiting sexual orientation discrimination. Allowing antigay discrimination by all who might make a plausible claim that such conduct is a matter of religious faith would completely undermine the government's goal of eradicating discrimination. While this prospect is present in most free exercise exemption cases, it is a particular concern with regard to antidiscrimination statutes, because anyone might invoke divinely inspired notions of what is "naturally ordained" to justify discrimination against gay men and lesbians.[110]

The second line of reasoning in the Court's opinion relied on the commercial aspects of Lee's activity. After making the relatively uncontroversial observation that religious liberty is not without limits,[111] the Court drew a stark line:

> When followers of a particular sect enter into *commercial activity* as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.[112]

Thus, the Court believed that Lee's adherence to his religious beliefs, as manifested by his refusal to pay social security taxes, could have imposed a cost on third parties, specifically, on employees who did not share his religious beliefs. By refusing to sanction this type of

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108 Id. at 260.

109 Id.

110 For example, Professor Richard Duncan apparently believes that "to advocate homosexuality as a legitimate lifestyle, equal to marital relationships, constitutes an 'assault on the extremely hard-won, millennia-old battle for a family-based, sexually monogamous society.'" Duncan, supra note 11, at 413 n.72 (quoting Dennis Prager, Homosexuality, the Bible, and Us—A Jewish Perspective, The Public Interest, Summer 1993, at 73, 73). But nothing about same-sex orientation is necessarily inconsistent with sexual monogamy or even with family, unless Duncan is implicitly invoking a particular Biblically prescribed vision of "family." See, e.g., Koppelman, supra note 12, at 253-54 (discussing the "rigidly defined" notion of family needed to support claims that homosexuality is a threat to family). See generally Kris Franklin, "A Family Like Any Other Family": Alternative Methods of Defining Family in Law, 18 N.Y.U. Rev. L. & Soc. Change 1027 (1990-91) (advocating use of multiple, nonrestrictive definitions of "family").

111 *Lee*, 455 U.S. at 261 ("[E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs.").

112 Id. (emphasis added).

imposition, the *Lee* Court acted to protect third-party rights, even though this effectively forced Lee to make the painful choice of acting contrary to his religious beliefs or engaging in a different "commercial activity." Moreover, the Court refused to exempt Lee despite his current employees' being other Amish who shared his belief.[113] Thus, constitutional authority for government to regulate commercial affairs, especially matters such as employment relationships, extends even to situations where the interests of those outside a faith community are only *potentially* threatened. This suggests that constitutionally compelled exemptions from civil rights laws should be rare in the commercial realm, so that discrimination does not threaten to impose financial, emotional, and social costs on nonconsenting individuals. Thus, for example, a church that ran a large publishing house could not invoke the free exercise clause to discriminate against a lesbian applicant for a data entry position in contravention of a state's antidiscrimination statute.[114]

3. Tony and Susan Alamo Foundation: *Labor Laws*

In *Tony and Susan Alamo Foundation v. Secretary of Labor*[115]—another unanimous decision—the Supreme Court denied a free exercise challenge to requirements of the Fair Labor Standards Act. In contrast to the for-profit businesses in *Braunfeld* and *Lee*, in *Alamo* a nonprofit corporation operating for religious purposes claimed a free exercise exemption. Yet the difference did not change the character of the activity for constitutional purposes; it remained commercial, where the locus of authority lies with the government rather than with religious actors. Consequently, even when religious motivation is present, if an activity has an otherwise commercial character, the free exercise clause will not preclude governmental regulation of the conduct.

The Tony and Susan Alamo Foundation (the Foundation) was a nonprofit religious corporation organized "to do those things needful for the promotion of Christian faith, virtue, and charity."[116] The Foundation "derived its income largely from the operation of a [wide array] of commercial businesses."[117] These businesses—more than

113 See id. at 254, 257.

114 But see Madsen v. Erwin, 481 N.E.2d 1160, 1166 (Mass. 1985) (holding, prior to Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990), discussed in Part III.A infra, that Christian Science Church had right to fire lesbian writer from The Christian Science Monitor).

115 471 U.S. 290 (1985).

116 Id. at 292 (quoting App. to Brief for Petitioners at 2, *Tony & Susan Alamo Found.* (No. 83-1935)).

117 Id. at 292 n.2.

three dozen in number[118]—were primarily staffed by the Foundation's "associates" who received "food, clothing, shelter, and other benefits" but no cash salaries from the Foundation.[119] The Foundation's aunual gross sales exceeded $250,000.[120]

The case arose when the Secretary of Labor filed an action to compel the Foundation to comply with the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act (FLSA).[121] The Court of Appeals for the Eighth Circuit affirmed the district court's holding that the free exercise clause did not shield the Foundation from the FLSA's requirements.[122] The Court of Appeals explained its conclusion by stating that

> it would be difficult to conclude that the extensive *commercial enterprise* operated and controlled by the foundation was nothing but a religious liturgy engaged in bringing good news to a pagan world. By entering the economic arena and trafficking in the marketplace, the foundation has subjected itself to the standards Congress has prescribed for the benefit of employees.[123]

On review of this holding, the Supreme Court affirmed both the applicability of the statute and the rejection of the Foundation's free exercise defense.[124] The Court first noted that the Act "contains no express or implied exception for commercial activities conducted by religious or other nonprofit organizations,"[125] and gave interpretive deference to the Labor Department's definition of the term "business enterprises" as used in the Act:[126] The agency's own regulation provided that where religious "organizations engage in ordinary commercial activities, such as operating a printing and publishing plant, the business activities will be treated under the Act the same as when they are performed by the ordinary business enterprise."[127]

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118 Id.

119 Id. at 292.

120 Id. at 296 n.10.

121 29 U.S.C. §§ 206(b), 207(a), 211(c), 215(a)(2), 215(a)(5) (1988).

122 *Tony & Susan Alamo Found.*, 471 U.S. at 293-95.

123 Id. at 294-95 (emphasis added) (quoting Donovan v. Tony & Susan Alamo Found., 722 F.2d 397, 400 (8th Cir. 1983)) (internal quotation marks omitted).

124 See id. at 295.

125 Id. at 296-97 (footnote omitted). The Court noted as well the "broad congressional consensus that ordinary commercial businesses should not be exempted from the Act simply because they happened to be owned by religious or other nonprofit organizations." Id. at 298.

126 While the Court made its observations in the course of deciding whether the FLSA applied to the Foundation, they should not be discounted as mere statutory interpretation, at the very least because the Court upheld the statute at issue against a constitutional challenge.

127 Id. at 297 (quoting 29 C.F.R. § 779.214 (1984)) (internal quotation marks omitted).

The Court's free exercise holding demonstrates that commercial affairs remain commercial even when they are religiously motivated. The Court explained why the Foundation's claims—that their businesses were different from other businesses because they were "infused with a religious purpose" and served as "'churches in disguise'—vehicles for preaching and spreading the gospel to the public"[128]—failed to support a constitutional exemption:

> The characterization of petitioners' businesses, however, is a factual question resolved against petitioners by both courts below .... The lower courts clearly took account of the religious aspects of the Foundation's endeavors, and were correct in scrutinizing the activities at issue by reference to *objectively ascertainable facts* concerning their nature and scope. Both courts found that *the Foundation's businesses serve the general public in competition with ordinary commercial enterprises*, and the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of "unfair method of competition" that the Act was intended to prevent, and *the admixture of religious motivations does not alter a business's effect on commerce*.[129]

Thus, for the purpose of free exercise analysis, whether an activity is characterized as commercial or religious depends upon "objectively ascertainable facts." Some activities are objectively classifiable as religious, such as communicative and associative activities engaged in solely for purposes of worship or proselytizing. Other activities, although pursued for both religious and secular reasons, are nonetheless constitutionally classifiable as commercial, at least in part. These would include most "businesses serv[ing] the general public in competition with ordinary commercial enterprises," such as the service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, and other operations run by the Tony and Susan Alamo Foundation.[130] Applying this logic, even a temple community center run by or as a nonprofit religious corporation and engaging in only a small amount of commercial activity would still need to comply with an applicable statute prohibiting sexual orientation discrimination, the free exercise clause and any religious motivation for discriminating notwithstanding.

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[128] Id. at 298-99.

[129] Id. at 299 (emphases added) (citations omitted).

[130] Id. at 298 n.18. There is no compelling reason to conclude otherwise where the basis for a statute is not Congress's commerce power but the police power of a state. Although the Constitution does explicitly recognize Congress's authority to regulate commerce, the tenth amendment recognizes that state governments retain general legislative competence.

B. Religious Autonomy in Transmitting Doctrine

Antipodal to the commercial zone, where the locus of authority lies with government, Supreme Court decisions suggest the existence of a "zone of doctrinal transmission." Religious individuals and organizations are vested with the primary authority over the associational conduct and verbal or printed communication falling within this zone. The zone embraces a range of activities necessary for the transmission of religious belief and doctrine: prayer, preaching, proselytizing, and group worship. Here, as a result of the restrictions of the first amendment and their incorporation into the fourteenth, government is largely devoid of regulatory power.[131] Consequently, the Supreme Court has invalidated a number of laws that bestowed state actors with improper authority over this type of conduct.

In 1940 the Supreme Court decided *Cantwell v. Connecticut*,[132] the first of its cases to hold that the fourteenth amendment incorporated the religious guarantees of the first amendment, making them binding on the state governments.[133] In *Cantwell*, three Jehovah's Witnesses were arrested after attempting to solicit contributions and sell religious publications door-to-door, using phonograph records to help explain the publications to willing listeners.[134] They were convicted of violating a Connecticut statute prohibiting charitable or reli-

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[131] In effect, this Section's analysis identifies the chief substantive concern of the free exercise clause (other than its antipersecution norm, see infra) as conduct in pari materia with that protected under other provisions of the first amendment. This position draws from, and is quite similar to, Professor Marshall's views. See generally William P. Marshall, Solving the Free Exercise Dilemma: Free Exercise as Expression, 67 Minn. L. Rev. 545 (1983).

Because the Bill of Rights was intended as reassurance to the people of the states that the new federal government was not being ceded certain dangerous powers, the criticism that this Note's interpretation of the free exercise clause reduces that guarantee to a worthless redundancy loses much force. In addition to the substantive core identified herein, the free exercise clause also includes a strong antipersecution principle. See text accompanying notes 73-76 supra. That the fourteenth amendment, which limits the states rather than the federal government, also embraces such a norm is a similar redundancy argument, one which is entitled to even less weight than the aforementioned protestation, for the free exercise clause, as part of the first amendment, does not in and of itself apply to the states. See Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833) (stating that the Bill of Rights "demanded security against the apprehended encroachments of the general government—not against those of the local government").

[132] 310 U.S. 296 (1940).

[133] The Court wrote:

> The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.

Id. at 303 (footnote omitted).

[134] Id. at 301.

gious solicitations without prior approval by local officials and of inciting a breach of the peace.[135] Their successful appeal established that freedom of religion receives protection akin to that accorded freedom of speech and press and association.

In reversing the Witnesses' convictions, the Court noted that the guarantees of the religion clause "embrace[ ] two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[136] Yet, although governmental regulation may extend even to religious conduct, the problem with the statute in *Cantwell* was that it gave a bureaucrat unfettered discretion to grant licenses for the dissemination of religious tracts and solicitation of contributions.[137] Thus, it implicitly allowed the bureaucrat to "*wholly deny* the right *to preach or to disseminate religious views*."[138] The statute was unconstitutional because with its lack of standards it operated as a prior restraint on the propagation of religious belief through speech and press.[139] Similarly, the Court viewed the broad scope of Connecticut's common law offense of inciting a breach of the peace as "unduly suppress[ing] free communication of views, *religious or other*, under the guise of conserving desirable conditions."[140] The Court found that, as offensive as the defendants' attacks upon the Catholic church may have been to their Catholic listeners,[141] they did not constitute a "clear and present menace to public peace and order."[142] Instead, the appellant's criticisms were a constitutionally protected exercise of the "freedom to communicate information and opinion."[143]

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135 Id. at 300. Of the three convictions on the incitement count, only Jesse Cantwell's reached the United States Supreme Court. See id.

136 Id. at 303-04.

137 [H]e is empowered to determine whether the cause is a religious one, and . . . the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

Id. at 305.

138 Id. at 304 (emphases added); see id. ("[I]n the absence of a certificate, solicitation is altogether prohibited.").

139 See id. at 304, 306-07.

140 Id. at 308 (emphasis added).

141 See id. at 309, 311.

142 Id. at 311.

143 Id. at 307.

Thus, the Supreme Court in *Cantwell* did not hold that the constitutional guarantee of religious freedom entitled religious adherents to general exceptions from governmental regulation. It did, however, hold that where direct suppression of communication of religious opinions by spoken or printed word is concerned, the Constitution stakes out a protective zone of freedom, requiring governmental regulations to be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State."[144]

Other Supreme Court cases have repeatedly affirmed this constitutional solicitude for religious conduct akin to other protected first amendment activity, primarily verbal or written communication and group association.[145] The implication is that conduct such as preaching, disseminating religious tracts, and group religious worship is subject to greater protection under the free exercise clause than are other sorts of religious activities. For example, in *Murdock v. Pennsylvania*,[146] the Court struck down a flat license fee imposed as a precondition to soliciting contributions for religious tracts. In so doing, the Court congratulated itself for "restor[ing] to their high, constitutional position the liberties of itinerant evangelists who *disseminate their religious beliefs and the tenets of their faith* through distribution of literature."[147] The Court's decision also explicitly placed freedom of religion on a par with freedom of speech and freedom of the press.[148]

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144 Id. at 311.

145 It must be noted that Davis v. Beason, 133 U.S. 333 (1890), flatly contradicts the analysis in this Section. In *Davis* the Supreme Court upheld a territorial law denying the rights to vote, serve as a juror, or hold public office to anyone associated with organizations espousing the doctrine of polygamy. Id. at 346-47. This statute was targeted at the Mormon Church, and the conduct that triggered the legal disability was mere religious association. See, e.g., David P. Currie, The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1889-1910, 52 U. Chi. L. Rev. 867, 868 n.10 (1985) ("[The law in *Davis*] went so far beyond the suppression of actual polygamy as to interfere with the basic right to associate with others of the same religious belief." (citing Philip Kurland, Religion and the Law 25 (1962))). It is a premise of this Note that *Davis* was egregiously wrongly decided at the time and that subsequent constitutional developments in the area of associational rights and unconstitutional conditions doctrine have wholly vitiated *Davis*. See, e.g., Richardson v. Ramirez, 418 U.S. 24, 81 (1974) (Marshall, J., dissenting) ("To the extent . . . *Davis* approve[s] the doctrine that citizens can be barred from the ballot box because they would vote to change the existing criminal law, [that] decision [is] surely of minimal continuing precedential value."). But see Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2228 (1993) (suggesting that conduct at issue in *Davis* "may have been a legitimate concern of government for reasons quite apart from discrimination").

146 319 U.S. 105 (1943).

147 Id. at 117 (emphasis added).

148 See id. at 115; see also id. at 111 (implicitly comparing "constitutional rights of those

Similarly, in *McDaniel v. Paty*,[149] the Supreme Court invalidated a Tennessee statute excluding clergy from participating in that state's constitutional convention. The starting point of the Court's analysis was the proposition that "the right to the free exercise of religion unquestionably encompasses the right to *preach, proselyte, and perform other similar religious functions*, or, in other words, to be a minister of the type McDaniel was found to be."[150] Chief Justice Burger, writing for a plurality, held that the restriction violated the guarantee of free exercise by unconstitutionally conditioning the exercise of a civil right on the sacrifice of a religious one.[151] The religious right at stake was the right to communicate religious views and to associate for wholly religious purposes: The statute was directed at McDaniel's "status as a 'minister' or 'priest,'" a status "defined in terms of conduct and activity."[152] The challenged measure restricted not only religious speech but also association for entirely religious purposes, for it disqualified "those filling a 'leadership role in religion[ ].'"[153] Invoking strict scrutiny,[154] the Court concluded that the alleged threat addressed by the statute (infection of the political process by clerical participation) did not have a historical record of occurrence, and therefore the merely speculative possibility of its happening was insufficient to establish the act's constitutionality.[155] Like *Murdock*, *McDaniel* shows that the free exercise clause demands exacting review of governmental action infringing freedom of religious communication and association. Indeed, Justice Brennan's concurrence explicitly confirmed that *religiously* motivated discussion, association, and political participation

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spreading their religious beliefs through the spoken and printed word" and "[t]he right to use the press for expressing one's views").

See also Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 305 (1985) (upholding the enforcement of the FLSA against a nonprofit religious corporation's free exercise and establishment clause challenges, while noting that "[t]hese requirements appl[ied] only to commercial activities undertaken with a 'business purpose,' and would therefore have no impact on petitioners' own *evangelical activities* or on individuals engaged in volunteer work for other religious organizations." (emphasis added)).

149 435 U.S. 618 (1978).

150 Id. at 626 (opinion of Burger, C.J., joined by Powell, Rehnquist, and Stevens, JJ.) (emphasis added).

151 Id.; see also id. at 633-34 & 627 n.6 (Brennan, J., joined by Marshall, J., concurring in the judgment) (using unconstitutional conditions analysis).

152 Id. at 627 (emphasis omitted).

153 Id. at 627 n.6 (quoting the Tennessee Supreme Court opinion in the case, Paty v. McDaniel, 547 S.W.2d 897, 903 (Tenn. 1977)); see also id. at 631 n.3 (Brennan, J., joined by Marshall, J., concurring in the judgment) (protected religious conduct includes preaching and proselyting, public worship, and distribution of religious literature).

154 See id. at 627-28 & nn.7-8 (Burger, C.J., joined by Powell, Rehnquist, and Stevens, JJ.).

155 See id. at 628-29.

enjoy the same high constitutional status bestowed upon "rights of discussion, association, and political participation *generally*."[156]

These conclusions about the zone of religious freedom appropriately limit the scope of laws prohibiting sexual orientation discrimination. Such laws (as with state antidiscrimination statutes in general) often contain provisions making it illegal "to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so."[157] Where the aiding or inciting consists solely of general exhortations grounded in religious beliefs, or where the attempted coercion takes the form of threats of divine displeasure or punishment without secular pressure being brought to bear and without urging particular courses of action with respect to specific victims, *Cantwell* shows that such actions are generally beyond the permissible scope of legislative proscription.[158]

Moreover, any law prohibiting sexual orientation discrimination would be subject to the strictest scrutiny were it applied to require, for example, admittance of a lesbian, gay, or bisexual person into a faith community such as a church's leadership or even its membership. No matter how compelling the government's general interest in eliminating discrimination, the composition of a religious community is a subject of no cognizable governmental concern. Hence, to so apply a civil rights law would not pass constitutional muster.

C. Shared Authority: Education and Unemployment Compensation

The Supreme Court's free exercise decisions involving education and unemployment compensation are perhaps the most relevant to the resolution of religion-based challenges to sexual-orientation antidiscrimination laws. The education cases are troublesome because they cannot be resolved simply by categorizing them as restrictions on expressive or associative religious conduct. Similarly, despite their commercial aspects, the unemployment compensation cases do not fit neatly into the commercial zone. These tensions are further exacerbated by the fact that both education and employment are traditional arenas for civil rights legislation. In both types of cases the Supreme

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156 See id. at 640 (Brennan, J., joined by Marshall, J., concurring in the judgment) (emphasis added).

157 N.J. Stat. Ann. § 10:5-12(e) (1993).

158 *Cantwell*'s holding was qualified by the suggestion that the constitutionality of a narrowly tailored legislative act targeting a perceived harm from offensive proselytizing would present a more difficult question. See Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940).

Court has applied strict scrutiny to resolve controversies.[159] Generalizing from these cases requires an understanding of why the Court has been so exacting here, and so the following Section examines these two classes of precedent.

1. Education and Doctrinal Transmission

A number of the Court's cases involving education in various religious institutions have concerned doctrinal transmission, the survival of faiths, and religious pluralism, issues quite central to the first amendment's religion clauses. The education cases, however, do not fit neatly into the zone of doctrinal transmission sketched above in Section B. As these cases demonstrate, education can be, and is, used to transmit religious beliefs or doctrine. At the same time, state governments have a tremendous amount of regulatory authority in this vitally important area. Thus, although these cases often employ strict scrutiny, their subject matter is not one in which the primary locus of authority is with religious individuals and organizations. Rather, authority over education is shared between private actors and government, and the cases accordingly tend to emphasize state regulatory authority more than do the doctrinal transmission cases.

In 1972, the Supreme Court rendered a rare decision granting a substantial exemption to protect religious liberty. *Wisconsin v. Yoder*[160] presented the Court with a free exercise challenge to the state's compulsory education statute. In ruling that the statute was unconstitutional as applied, the Court took seriously the guarantees of religious freedom contained in the Constitution. At the same time, the Court was careful to delineate the scope of those guarantees; thus, *Yoder* also affirmed that religious rights are not absolute and must at times yield when private rights or the public welfare are threatened. Since antidiscrimination statutes protect (and establish) rights of private persons in the service of the public weal, *Yoder* suggests that religious adherents would face an uphill battle in seeking exemption from laws prohibiting discrimination on the basis of sexual orientation.

Jonas Yoder and his children were members of the Old Order Amish religion. As a Wisconsin resident, Yoder was required by state law to send his children to either public or private school until age

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[159] But cf. Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1247 (1994) ("[I]n the religion cases, the [compelling state interest] test is strict in theory but feeble in fact.").

[160] 406 U.S. 205 (1972). *Yoder* was decided against the background of Pierce v. Society of Sisters, 268 U.S. 510 (1925), which held that the due process clause forbids a state to require children to attend *public* elementary and secondary schools. Id. at 534-35.

sixteen.[161] The Amish believed that their salvation and that of their children required them to withdraw their children from public schools after the eighth grade so that they might be educated in a trade within their religious community. When Yoder did so, he was prosecuted in a Wisconsin county court for violating the mandatory attendance law. Upon conviction, the state fined him five dollars.[162]

Yoder appealed his conviction, which the Wisconsin Supreme Court ultimately reversed as a violation of the free exercise clause of the first amendment.[163] The United States Supreme Court's decision upholding the reversal of Yoder's conviction[164] was a landmark victory for religious freedom. Nevertheless, while granting an exemption so as to avoid either the destruction of the Amish way of life or a forced migration of this religious community,[165] the Court emphasized that its ruling did not exempt religious individuals from all state regulation that conflicted with sincerely held religious belief. Chief Justice Burger, speaking for the majority, had no doubt that the state had the power "to impose *reasonable regulations* for the control and duration of basic education."[166] The Court reaffirmed that "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers."[167] Even though the free exercise clause protects some types of conduct, "religiously grounded conduct must often be subject to the broad police power of the State"[168] when it poses "some substantial threat to public safety, peace, or order."[169] The Court concluded by expressly confirming Wisconsin's power to enact "reasonable standards" for regulating the education Amish youth receive in their community after leaving the eighth grade.[170]

Chief Justice Burger's opinion for the Court offers several clues crucial to understanding *Yoder* in the context of civil rights laws. En route to granting Yoder an exemption from Wisconsin's compulsory education statute, the opinion posited that one purpose of compulsory

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161 *Yoder*, 406 U.S. at 207.

162 Id. at 208.

163 Id. at 213. The first amendment applied to the state by virtue of the fourteenth amendment. See id. at 207.

164 Id. at 207.

165 See id. at 212, 217-19 & n.9.

166 Id. at 213 (emphasis added).

167 Id. at 220.

168 Id.

169 Id. at 230 (quoting Sherbert v. Verner, 374 U.S. 398, 403 (1963)) (internal quotation marks omitted).

170 See id. at 236.

education statutes was to prevent the employment of young children "under conditions hazardous to their health."[171] The Court proceeded to emphasize that there was "no intimation that the Amish employment of their children on family farms is in any way deleterious to their health or that Amish parents exploit children at tender years."[172] Chief Justice Burger carefully distinguished *Yoder* from a case in which harm to the physical or mental health of a child was threatened.[173]

The Court's decision turned on two related factors: the absence of conflicting private rights held by others, and the fact that no harm flowed from the religious conduct at issue. Free exercise of religion generates costs when it interferes with rights of other individuals, as it does when it causes harm to others. When the exercise of religion does not impose such costs, legislation that infringes upon religious freedom cannot be constitutionally sustained under a state's police power. As the Chief Justice noted, "[a] way of life that is odd or even erratic but *interferes with no rights or interests of others* is not to be condemned because it is different."[174] Thus, the state may not proscribe conduct that does not cause harm.

Where, however, religiously motivated actions might "jeopardize the health or safety" of others or "have a potential for significant social burdens,"[175] the state may restrict that conduct.[176] In the majority's words, "material[ ] detract[ion] from the welfare of society" may suffice to uphold regulatory legislation against a free exercise challenge.[177]

The Court therefore believed that states may enact statutes prohibiting quasi-public conduct that harms individuals or society. Moreover, it strongly implied that religious convictions are constitutionally insufficient grounds for exemption from such laws, or, at a minimum, that the Court might not apply strict scrutiny to these

171 Id. at 228.

172 Id. at 229.

173 Id. at 230. Chief Justice Burger chided the dissent for introducing unsupported speculation that the Amish children's desires diverged from their parents'. See id. at 231; see also id. at 237 (Stewart, J., joined by Brennan, J., concurring) (observing that all relevant information in record supported claim that children's interests matched those of their parents). In fact, Mr. Yoder's daughter Frieda withdrew from school because of her religious beliefs. See id. at 231 n.21. The Chief Justice stressed that *Yoder* presented no "actual conflict" between the rights of parents and children, only between parents and the State. See id. at 232.

174 Id. at 224 (emphasis added).

175 Id. at 234.

176 See id. at 234-35.

177 Id. at 234.

laws.[178] Antidiscrimination laws, which fall well within the scope of the states' police power,[179] enforce an egalitarian public order and protect persons from the tangible and dignitary harm of acts of discrimination. For this reason, a law prohibiting sexual orientation discrimination in this middle zone would likely not be subject to strict scrutiny under the free exercise clause.

Bob Jones University v. United States[180] presents a somewhat different scenario. In *Bob Jones University*, the Supreme Court considered statutory and constitutional challenges to actions taken by the IRS to deny tax exempt status to two racially discriminatory, private religious schools. Applying compelling state interest analysis,[181] the Court upheld the denials.[182] Differences between race and sexual orientation raise the question whether a statute protecting lesbians, gays, and bisexuals from discrimination would survive such scrutiny in a similar context. Even so, while the level of scrutiny the Court employed was important, so was the fact that the schools were simultaneously educational institutions *and* highly selective religious communities.

Bob Jones University (BJU), a nonprofit corporation, operated a school for kindergarten, elementary, secondary, college, and graduate students.[183] Although "not affiliated with any religious denomination," BJU was "both a religious and educational institution" and was "dedicated to the teaching and propagation of its fundamentalist Christian religious beliefs."[184] BJU strictly enforced one of its religious tenets prohibiting interracial marriage or dating, upon pain of expulsion, and refused to accept applicants "engaged in an interracial marriage or known to advocate interracial marriage or dating."[185]

Goldsboro Christian Schools was a nonprofit corporation similarly founded "to conduct an institution of learning . . . , giving special emphasis to the Christian religion and the ethics revealed in the Holy

178 See, e.g., id. at 235-36 (emphasizing Yoder's showing that Amish way of life served "precisely" the same interests as the compulsory education laws, "[i]n light of" which showing the state had a high burden of proof).

179 See Part I.A supra.

180 461 U.S. 574 (1983).

181 See supra note 17.

182 See *Bob Jones Univ.*, 461 U.S. at 603-04.

183 See id. at 580.

184 Id.

185 See id. at 580-81. BJU, at one time, had denied admissions to all black applicants, and then later denied admission to unmarried black applicants. It modified that policy in response to the holding in Runyon v. McCrary, 427 U.S. 160, 178-79 (1976), which found racial discrimination in private education illegal. See *Bob Jones Univ.*, 461 U.S. at 580 & n.5.

scriptures."[186] Students from kindergarten through high school began every class with prayer, and high school students were required to take "Bible-related courses."[187] Goldsboro also maintained a racially discriminatory admissions policy grounded in its belief that God ordained the separation of the races. The school consequently admitted only white students although it occasionally admitted biracial students who had one white parent.[188]

The IRS denied BJU and Goldsboro tax exempt status.[189] In response, the schools filed suit, arguing that the language of § 501(c)(3) of the Internal Revenue Code,[190] which included educational organizations, required that they be given tax-exempt status, and that the free exercise clause barred any contrary interpretation.[191]

To resolve the statutory issue, the Supreme Court turned to Congressional intent. The Court purported to find "underlying all relevant parts of the [Internal Revenue] Code, . . . the intent that entitlement to tax exemption depends on meeting certain common law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."[192] This allowed the Court to uphold the IRS's interpretation of the statute in light of the nation's commitment to eradicating racial discrimination in education.[193]

Turning to the constitutional issue, the Court, in an echo of *Yoder*,[194] noted that the free exercise clause generally extends constitutional protection to "*lawful* conduct grounded in religious belief."[195] The Court found, however, that compelling governmental interests are sufficient to justify regulation or even prohibition of religiously motivated conduct,[196] so long as the activity at issue is one generally subject to governmental control.[197] Here, the government asserted an

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186 *Bob Jones Univ.*, 461 U.S. at 583 (quoting Articles of Incorporation of Goldsboro Christian Schools, ¶ 3(a)) (internal quotation marks omitted).

187 See id.

188 See id.

189 See *Bob Jones Univ.*, 461 U.S. at 581, 583.

190 I.R.C. § 501(c)(3) (1988). § 501(c)(3) provides in pertinent part that the following types of organizations are generally tax-exempt: "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." Id.

191 *Bob Jones Univ.*, 461 U.S. at 585, 602-03.

192 Id. at 586.

193 See id. at 595.

194 See notes 160-79 and accompanying text supra.

195 *Bob Jones Univ.*, 461 U.S. at 603 (emphasis added).

196 See id. (citing United States v. Lee, 455 U.S. 252, 257-58 (1982)).

197 See id. (stating that there is "no constitutional infirmity in 'excluding [Jehovah's Witness children] from doing there *what no other children may do*'") (alteration in *Bob Jones Univ.*) (emphasis added) (quoting Prince v. Massachusetts, 321 U.S. 158, 171 (1944)).

interest in eliminating racial discrimination in education. The Court, therefore, concluded that insular religious schools, although enclaves of religious believers,[198] could not "be accommodated with that compelling governmental interest, and no 'less restrictive means' are available to achieve the governmental interest."[199]

Thus, under *Bob Jones University*, a religious entity generally would be subject to the same antidiscrimination regulations as any other institution when involved in a quasi-public activity, such as education, that falls within the police power of the state.[200] But, the Court hinted, this is not necessarily true where the activity at issue is private (even if communal), as is the case with worship services.[201] Indeed, the Court made clear that its holding applied only to religious *schools* and not to "purely religious institutions."[202]

This "disclaimer" indicates that, in all likelihood, the Court would refuse to find a compelling interest in a state policy against discrimination in *religion*. Precisely because religion is in many crucial respects a personal matter outside the sphere of state authority,[203] the first amendment's protection of freedom of belief and worship would presumably keep any governmental interest in antidiscrimination from being cognizable within this context. Freedom of individual worship may be a civil right, but equality in all religious matters—for example, the freedom to worship in unwelcoming churches—is not. Of course, *Bob Jones University* involved an institutional mixture of education and religion in a setting clearly designed to serve an exclusive religious community. In this circumstance, the Court invoked strict scrutiny as the appropriate standard of review.[204]

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198 See, e.g., id. at 580 ("[BJU's] teachers are required to be devout Christians, and . . . [e]ntering students are screened as to their religious beliefs . . . .").

199 Id. at 604.

200 See id. at 609 (Powell, J., concurring in part and concurring in the judgment) (stressing the "substantially secular character of the curricula and degrees offered" by the religious schools); id. at 610 n.4 ("Sectarian schools . . . 'have provided an educational alternative for millions of young Americans' and 'often afford wholesome competition with our public schools.'") (quoting Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part)).

201 See id. at 604 n.29 ("We deal here only with religious *schools*—not with churches or other purely religious institutions . . . .").

202 See id.

203 See Eisgruber & Sager, supra note 159, at 1273-77.

204 *Bob Jones Univ.*, 461 U.S. at 603 ("'The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.'" (citing United States v. Lee, 455 U.S. 252, 257-58 (1982))); id. at 604 ("The interests asserted by petitioners cannot be accommodated with that compelling governmental interest . . . ." (quoting *Lee*, 455 U.S. at 259-60)); id. ("and no 'less restrictive means' . . . are available to achieve the governmental interest" (citing Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1982))).

Bob Jones University, however, does not clearly and unequivocally require strict scrutiny where the conduct being governed is commercial or quasi-commercial activity within the sphere of state authority, rather than religious worship occurring wholly within a faith community. The two situations are distinguishable, for the harms that flow from discrimination in education are constrained and in an important sense "private" when the facility, service, or good at issue is not open to people of all faiths. It is unclear whether a law prohibiting sexual orientation discrimination would survive strict scrutiny were it drafted so as to include exclusionary religious schools such as the ones here.

The Court's language in its antidiscrimination cases has suggested that governments have compelling interests in eradicating more than just racial discrimination.[205] However, the opinion in *Bob Jones University* emphasized the multibranch, *national* policy against racial discrimination in education.[206] No national legislation prohibiting sexual orientation discrimination has yet been passed.[207] Might this fact dispositively distinguish the degree of state interest in laws prohibiting sexual orientation discrimination from that supporting laws banning racial discrimination?

This Note argues that, as a general matter, the answer is "no." The geographic scope of a governmental concern ought not render an otherwise compelling interest less commanding. Problems such as sexual orientation discrimination, AIDS, or homelessness are no less grave because they may as yet be unrealized throughout the full breadth of the nation.[208] States should not be dispossessed of the power to act early to rectify all discriminatory acts in quasi-public affairs, and the Court's discussion of a "national" commitment to racial equality in *Bob Jones University* should not be read to the contrary.

The more serious objection to state laws prohibiting sexual orientation discrimination is the potential intrusion on educational processes conducted by and for religious communities.[209] The schools

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205 See, e.g., text accompanying notes 58-62 and note 63 supra.

206 See, e.g., *Bob Jones Univ.*, 461 U.S. at 593 ("Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.").

207 But see note 54 supra.

208 Cf. *Bob Jones Univ.*, 461 U.S. at 592 ("[T]here can no longer be any doubt that racial discrimination in education violates deeply and *widely accepted* views of elementary justice." (emphasis added)).

209 In fact, the Supreme Court has been criticized for failing to give adequate attention to the needs of communities of faith. See, e.g., Robert M. Cover, The Supreme Court 1982 Term—Foreword: *Nomos* and Narrative, 97 Harv. L. Rev. 4, 66 (1983) ("[T]he Court avoided [the constitutional question] by simply throwing the claim of protected insularity

at issue in *Bob Jones University* were in an important sense not open to the general public, nor were they even quasi-public. They imposed solemn religious demands on their students and personnel. They were designed and run in part for secular purposes, but those purposes were inseparably intertwined with religious ones. After *Bob Jones University*, however, the Constitution may not demand[210] that those purposes allow religious communities to engage in discrimination that is invidious from the perspective of the lawmakers and the excluded.[211]

2. *Unemployment Compensation and Religious Discrimination*

In contrast to the tensions within the Supreme Court's education cases, between 1963 and 1990 the Court issued a string of four decisions applying a stringent standard of review to unemployment claims involving free exercise issues. In each case, the Court required provision of unemployment compensation benefits to persons whose religious convictions precluded them from accepting certain work, holding that the free exercise clause prohibited the states from denying unemployment benefits to these claimants.[212] At first blush these cases may appear to cast doubt on the primacy of governmental authority in the zone of commercial affairs, and they are often invoked as supporting a robust doctrine of religious exemption.[213] On closer inspection, however, the Court's unemployment compensation cases represent not grants of exemption from state authority over commercial activity,[214] but rather demands that deep religious beliefs be taken seriously as motivation for conduct. They are examples of the applica-

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to the mercy of public policy. The insular communities deserved better—they deserved a constitutional hedge against mere administration.").

210 This claim is somewhat tentative because the difference between denying a religious school a tax exemption and requiring it to stop discriminating upon pain of potentially devastating civil liability might be thought to be constitutionally significant. The viability of such a distinction is questionable in light of Sherbert v. Verner, 374 U.S. 398 (1963), which treated a governmental denial of economic assistance as the equivalent of an affirmative monetary tax or penalty. See id. at 403-04 & 404 n.5.

211 Even so, legislatures engaged in drafting civil rights statutes certainly must give such claims serious consideration if religious liberty is to be protected as a constitutional value.

212 See *Sherbert*, 374 U.S. at 402, 409-10; Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 720 (1981); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 139-41 (1987); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 832 (1989).

213 See, e.g., Eisgruber & Sager, supra note 159, at 1277 ("*Sherbert* and the short but durable line of cases that follow its lead are widely perceived as supporting the privileging view of religious freedom. . . . [Its] promise is largely unfulfilled in other contexts . . . .").

214 Cf. id. at 1277-82 (interpreting these cases as instances of religious discrimination).

tion of the nonpersecution principle of the free exercise clause[215] in the zone of shared religious and governmental authority.

Thus, this Note argues that the Court's unemployment cases pose little danger to the enforcement of civil rights laws protecting lesbian, gay, and bisexual individuals. In the Court's commercial zone precedents, the state is regulating commercial activities by prohibiting or demanding certain behavior of all persons engaged in particular enterprises. For example, government may require payment of minimum wages or may prohibit gender discrimination. In exemption cases involving commercial activity, people of faith argue—unsuccessfully—that their beliefs justify exemption from the government's demand that they commit or refrain from these specified actions.[216] In the unemployment context, by contrast, the state is not regulating commercial affairs but providing public assistance. Certainly the potential beneficiaries of such assistance will have greater or lesser need depending on their success in the commercial realm, which may, in turn, depend on their religious convictions.[217] But neither the believers' commercial activity nor their religious conviction is the *subject* of regulation; thus, these cases lie outside the religious zone of activity subject primarily to religious authority.

The claim in these unemployment compensation cases is merely that if the state is lending a helping hand to people who are seeking work, denying such assistance to people of faith because their religion complicates that search unconstitutionally disparages their deepest convictions and punishes their adherence to their faith. This concern about the disregard and persecution of religious belief underlies all four of the Court's unemployment compensation cases. These cases are much more about religious discrimination than they are about substantive bounds on the state's authority; thus, they are also outside the zone of commercial affairs over which the state has plenary authority. There is a crucial difference between an antidiscrimination law—a prohibitory measure designed to eliminate conduct inimical to the public good—and an unemployment compensation law—a public welfare law that bans no conduct but rather offers benefits to people in order to ward off economically undesirable circumstances.[218] For

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215 See text accompanying notes 73-76 supra.

216 See Part II.A supra.

217 Cf. Brief for Petitioner at 29, Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994) (No. 93-517) ("If a Hasidic family is poor because its members are unavailable to work on religious holidays or because of religious discrimination, the family's poverty is not a 'religious' need, and alleviating it is not an advancement of religion.").

218 The distinction is not one of category (that these are public benefits cases) but rather of persecution vel non. In Sherbert v. Verner, 374 U.S. 398 (1963), the religious person

these reasons, the Court's unemployment compensation cases lend little support to those seeking exemptions from civil rights laws.

In *Sherbert v. Verner*,[219] the earliest of these cases, South Carolina's unemployment compensation scheme disqualified workers who "without good cause" failed to accept "suitable work."[220] Adell Sherbert had worked for her employer for approximately thirty-five years.[221] When the textile mill changed to a six-day week including Saturday, she notified her employer that her faith required her not to work on Saturdays.[222] For six weeks, her "employer used a substitute for [her] when and as needed on Saturdays,"[223] but then informed her that she must either work on her Sabbath or be discharged.[224] Sherbert began looking for other work, and even considered employment in another industry, but she was unable to find a position that would not require her to violate her Sabbath.[225]

The United States Supreme Court treated South Carolina's subsequent denial of unemployment compensation benefits as a case of unconstitutional conditions.[226] The Court held that by conditioning Sherbert's eligibility for support payments on her willingness to forgo her free exercise right to observe her Sabbath, the state pressured her to do what it could not do directly,[227] that is, require Sherbert to ig-

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seeking accommodation did not wish to violate any prohibitory law designed to prevent harm to others, and the state interests (in protecting its citizenry from economic misfortunes) were arguably better served by granting benefits to Sherbert than by denying them. Thus, the denial of benefits was suspect. With respect to antidiscrimination laws, religious claimants seek to disregard a protective statute at the expense of others, and the state interest in prohibiting discrimination would be directly undermined by granting an exemption. Hence, a denial of exemption would not suggest persecution.

219 374 U.S. 398 (1963).

220 *Sherbert*, 374 U.S. at 400-01.

221 *Sherbert*, 125 S.E.2d 737, 737 (S.C. 1962), rev'd, 374 U.S. 398 (1963).

222 Id. at 746 (Bussey, J., dissenting).

223 Id.

224 See id.

225 See id. at 747.

226 See *Sherbert*, 374 U.S. at 404 ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."); id. at 404 n.5 (citing unconstitutional conditions precedents). See generally David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 N.Y.U. L. Rev. 675, 694-701 (1992) (reviewing unconstitutional conditions precedents and scholarship).

227 See *Sherbert*, 374 U.S. at 404:

> [A]ppellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

nore her Sabbath.[228] Poor treatment of adherents of nonmainstream religions in the administration of a public benefits program presented a different issue than a uniform proscription of conduct, for the Court distinguished Sherbert's case from *Braunfeld v. Brown*,[229] which had earlier upheld Sunday closing laws against a free exercise challenge.[230]

Two other features of *Sherbert* exacerbated the intolerance of nonmainstream religion that troubled the Court. First, South Carolina explicitly protected Sunday worshippers from having to violate their Sabbath, through its general Sunday closing laws[231] and a state statute that specifically required employers to allow employees to honor a Sunday Sabbath and to refrain from discriminating against employees who do so.[232] Second, the statute conditioned eligibility for compensation on individuals' willingness to accept "suitable" work. The statute further provided: "In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety *and morals* . . . ."[233] This direction might have left Sherbert eligible for benefits on the understanding that work requiring her to violate the commands of her religion was morally hazardous for her. The South Carolina Supreme Court, however, gave the provision a narrow construction and denied Sherbert benefits.[234]

The Supreme Court's reversal of the state court must be read as a censure of religious intolerance and an attempt to recognize religious pluralism. When the majority of the state's workers are protected from having to work on their Sabbath, it takes little to suspect that a law incorporating case-by-case determinations of least-common-denominator morality by ill-equipped administrators[235] will inevitably

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228 See id. at 403 ("Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation.").

229 366 U.S. 599 (1961); see also *Sherbert*, 374 U.S. at 408 ("[T]he state interest asserted in the present case is wholly dissimilar to the interests [in *Braunfeld*].").

230 See discussion in Part II.A.1 supra.

231 See *Sherbert*, 125 S.E.2d 737, 745 (S.C. 1962), rev'd, 374 U.S. 398 (1963).

232 See *Sherbert*, 374 U.S. at 406.

233 *Sherbert*, 125 S.E.2d at 739 (emphasis added) (quoting amended § 68-114(3)(a) (enacted 1955)).

234 "When the General Assembly provided that in determining whether any work is suitable for an individual, the Commission should consider the degree of risk involved to morals, it obviously had in mind work, the character of which would be morally objectionable to *any* employee." Id. at 744 (emphasis added).

235 See, e.g., Thomas v. Review Bd. of Ind. Employment Sec. Div., 381 N.E.2d 888, 889 (Ind. App. 1978) (en banc) (findings of hearing examiner included that "claimant . . . indicated a religious belief of Jehovah Witness [sic]," that "claimant was transferred to the terret [sic] line," and that Thomas's "religious beliefs specifically exempts [sic] claimant from producing or aiding in the manufacture of items used in the advancement of war"

punish those whose faiths lie outside the mainstream. The Court's explanation of why its order did not itself violate the establishment clause, for example, supports this conclusion: "[T]he extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences."[236]

Seventeen years later, the Supreme Court in *Thomas v. Review Board of the Indiana Employment Security Division*[237] reviewed another state denial of benefits to a religious employee. Indiana had denied Eddie Thomas unemployment payments after he quit his job at a steel foundry upon being transferred to a division making tank turrets. Unlike other Jehovah's Witnesses at the foundry, Thomas's own interpretation of "Witnesses' principles" proscribed work producing weapons parts.[238] Again, the United States Supreme Court treated the case as one of unconstitutional conditions: "[A] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."[239] Elaborating, it declared that

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.[240]

The Court's opinion did not specifically distinguish *Braunfeld v. Brown*, but, as in *Sherbert*, it emphasized coercion of conscience,[241] which along with fair administration of public programs[242] differentiates an unemployment compensation statute from the broad proscription of Sunday work upheld in *Braunfeld*.

(alteration in original)), superseded, 391 N.E.2d 1127 (Ind. 1979), rev'd, 450 U.S. 707 (1981).

236 *Sherbert*, 374 U.S. at 409 (emphasis added).

237 450 U.S. 707 (1981).

238 See id. at 710-11.

239 Id. at 716 (referring to the holding in Everson v. Board of Educ., 330 U.S. 1, 16 (1947)).

240 Id. at 717-18.

241 See, e.g., id. at 717 ("[T]he coercive impact on Thomas is indistinguishable from *Sherbert*.").

242 The details of Thomas's case amply explain the Court's concern over the fairness of the Indiana unemployment compensation program. Thomas did not have the benefit of legal representation at the benefits hearing. Id. at 710-11. Moreover, the hearing officer at times displayed hostile sarcasm in his questioning of Thomas. After learning that Thomas would not find later military use of raw materials he produced "chargeable" to his conscience, the referee asked: "Okay, is it the social atmosphere that makes a tank or is it the people? I don't know." Thomas v. Review Bd. of Ind. Employment Sec. Div., 391 N.E.2d 1127, 1131-32 (Ind. 1979), rev'd, 450 U.S. 707 (1981).

The Supreme Court took a particularly dim view of the reviewing Indiana court's scrutiny of Thomas's beliefs. The Indiana court had "concluded that 'although the claimant's reasons for quitting were described as religious, it was unclear what his belief was, and what the religious basis of his belief was.'"[243] The Supreme Court faulted the Indiana court for having "placed considerable reliance on the facts that Thomas was 'struggling' with his beliefs and that he was not able to 'articulate' his belief precisely."[244] Before finally condemning Indiana's administration of its unemployment compensation program, the Supreme Court proclaimed that

> Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.[245]

Finally, the Supreme Court chastised the Indiana court for giving weight to the fact that other Jehovah's Witnesses interpreted the requirements of their faith differently, for "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."[246]

But even more blatant religious discrimination was apparent in this case. The Indiana Supreme Court had distinguished Eddie Thomas's circumstances from those of Adell Sherbert as "not equal[ing] a violation of the kind of cardinal religious tenet at stake in *Sherbert*, involving work on one's Sabbath and the pressure to violate religious precepts or not to work at all."[247] This form of centrality requirement is itself unconstitutional—as the Supreme Court has repeatedly suggested in recent years[248]—and thus the denial of pay-

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243 *Thomas*, 450 U.S. at 714 (quoting, with alteration unindicated, 391 N.E.2d at 1133).

244 Id. at 715.

245 Id.

246 Id. at 715-16.

247 *Thomas*, 391 N.E.2d at 1133. The Indiana court had evidently mistaken a condition *sufficient* to establish a free exercise burden, see Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."), for a *necessary* condition.

248 See, e.g., Employment Div., Dep't of Human Resources v. Smith, 494 U.S 872, 886-87 (1990) ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field."); Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." (construing *Thomas*, 450 U.S. at 715-16)); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485

ments to Thomas rested upon an unconstitutional distinction between different sorts of religious belief.

The Supreme Court's concern with discrimination among religions continued in 1987 with its decision in *Hobbie v. Unemployment Appeals Commission of Florida*.[249] Paula Hobbie, a newly baptized Seventh-Day Adventist, lost her job after becoming unable to work her regularly scheduled shift, which conflicted with her new Sabbath. Florida then denied Hobbie's request for unemployment compensation benefits.[250] Once again, the Court adopted unconstitutional conditions and coercion of belief as the lenses through which to view the denial of benefits.[251] But the Court also suggested that the state's treatment of Sabbath observance as the "fault" of the plaintiff and as "misconduct" was probative of the unconstitutionality of Florida's unemployment compensation program.[252]

The Florida Commission had distinguished this case from *Sherbert* and *Thomas* on the grounds that Hobbie acquired her belief in Sabbath observance after her shifts had been set at her job.[253] The Supreme Court emphatically rejected this position as discriminatory:

> In effect, the Appeals Commission asks us to single out the religious convert for different, less favorable treatment than that given an individual whose adherence to his or her faith precedes employment. We decline to do so. The First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired.[254]

That the Supreme Court believed it was combatting religious discrimination is also apparent from its treatment of the Commission's establishment clause defense. Quoting from *Sherbert*, the Court noted its history of allowing certain accommodations of religion: "[T]he extension of unemployment benefits to Sabbatarians *in common with Sunday worshipers* reflects nothing more than the governmental obligation of neutrality in the face of religious differences . . . ."[255] And indeed, Justice Stevens's concurrence explicitly stated that "in

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U.S. 439, 457-58 (1988) ("[T]he dissent proposes a legal test under which it would decide which public lands are 'central' or 'indispensable' to which religions . . . . We think such an approach cannot be squared with the Constitution or with our precedents . . . .").

249 480 U.S. 136 (1987).

250 See id. at 138-39.

251 See, e.g., id. at 140 (asserting that state's disqualification of Sherbert "'force[d] her to choose between following the precepts of her religion and forfeiting *benefits*, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other'" (emphasis added) (quoting *Sherbert*, 374 U.S. at 404)).

252 See id. at 138-39; id. at 142 n.7.

253 See id. at 143-44.

254 Id. at 144.

255 Id. at 145 (emphasis added) (quoting *Sherbert*, 374 U.S. at 409).

[this] case, granting unemployment benefits is necessary to protect religious observers against unequal treatment."[256]

The constitutional infirmity in the Court's fourth unemployment compensation case, *Frazee v. Illinois Department of Employment Security*,[257] decided in 1989, was even clearer. William Frazee, a Christian unaffiliated with any recognized sect or denomination, was denied unemployment compensation benefits when he refused to accept employment requiring him to work on Sunday.[258] The state's action in denying benefits to someone whose Sabbath beliefs[259] required him to decline work, on the grounds that no organized church compelled him to do so, was found unconstitutional.[260] This institutional bias was discriminatory, and the Supreme Court accordingly ordered unemployment compensation benefits awarded.

Each of the unemployment decisions discussed above—*Sherbert*, *Thomas*, *Hobbie*, and *Frazee*—directed states to accommodate religion under "neutral" statutory schemes. However, a close reading of the Court's analysis reveals that concerns about religious discrimination, rather than a willingness to grant individuals an affirmative religious right to exemption for Sabbath observance, have driven its jurisprudence in this middle zone.[261] The types of concerns about religious discrimination that permeate the Supreme Court's unemployment cases do not generally require religious exemptions from civil rights laws prohibiting discrimination on the basis of sexual orientation. Moreover, in evaluating free exercise challenges to such laws in light of these cases, it is important to note that the *Sherbert* Court reaffirmed the power of government to regulate "certain overt acts

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256 Id. at 148 (Stevens, J., concurring in the judgment).

257 489 U.S. 829 (1989).

258 See id. at 830-31.

259 Id. at 833 & n.1. It is worth noting that the Court affirmed the authority of the state and its unemployment compensation hearing officer to make determinations of religious sincerity. See id. at 833 ("States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause."); id. at 833 n.1 ("From the very first report of the Illinois Division of Unemployment Insurance claims adjudicator, Frazee's refusal of Sunday work has been described as 'due to his religious convictions.'").

260 See id. at 834 (rejecting "the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization").

261 In fact, the Court in Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), decided after *Sherbert* and *Thomas* but before *Hobbie* and *Frazee*, found that a state statute requiring employers to excuse all employees from working on their Sabbath was itself an unconstitutional violation of the *establishment* clause. Id. at 710-11. Professors Eisgruber and Sager have argued that the decision confirms that the *Sherbert* line of cases is about the protection of religion from discrimination, rather than an affirmative privileging of religious conduct. See Eisgruber & Sager, supra note 159, at 1281-82.

prompted by religious beliefs or principles."[262] Much as *Wisconsin v. Yoder* presented no instance of conflicting rights,[263] Sherbert's insistence on observing her Sabbath, which ultimately led to the denial of unemployment benefits, "constitute[d] no conduct . . . of a kind within the reach of state legislation."[264] It was highly significant to the Court that Sherbert's actions, unlike acts of discrimination, did not "pose[ ] some substantial threat to public safety, peace or order."[265] Furthermore, the particular accommodation of religion involved—granting Sherbert benefits—did not infringe upon rights of others.[266]

This contrasts sharply with a claim for exemption from civil rights laws forbidding sexual orientation discrimination, which *do* fall within the police powers of government. Granting religious exemptions from these laws would deny "the benefits of public welfare legislation"[267] to the specially protected class of individuals—gay men, lesbians, and bisexuals[268]—by allowing a large number of people to discriminate against them. With the possible exception of facilities restricted to members of a particular religious community, free exercise exemptions from antidiscrimination laws would undermine the egalitarian public order that such laws seek to establish, creating precisely the access and dignitary harms that the Supreme Court held to be the legitimate concern of antidiscrimination laws.[269] Thus, even the rather protective *Sherbert* jurisprudence does not constitutionally compel such exemptions.

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[262] *Sherbert*, 374 U.S. at 402-03. Similarly, in Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989), the Court's most recent free exercise challenge to denial of unemployment benefits—aside from Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990), discussed in Part III.A infra—the Court affirmed that "there may exist state interests sufficiently compelling to override a legitimate claim to the free exercise of religion." *Frazee*, 489 U.S. at 835. The Court also repeated its never-clarified assertion that utterly freakish beliefs might be found "clearly nonreligious." Id. at 834 n.2.

[263] See text accompanying note 174 supra.

[264] *Sherbert*, 374 U.S. at 403.

[265] Id.

[266] See id. at 409.

[267] Everson v. Board of Educ., 330 U.S. 1, 16 (1947), quoted in *Sherbert*, 374 U.S. at 410.

[268] Of course, heterosexuals may also benefit from laws preventing discrimination on the basis of sexual orientation, particularly if the law also explicitly or by implication prohibits discrimination on the basis of perceived sexual orientation. That heterosexual Americans are intended (only) as secondary beneficiaries of laws against sexual orientation discrimination should be of no more concern than the fact that white Americans were not the primary intended beneficiaries of laws proscribing racial discrimination.

[269] See, e.g., text accompanying notes 58-60 supra.

III
THE STATUS OF THE FREE EXERCISE ZONES AFTER 1993

In 1990 the Supreme Court issued its most important free exercise decision in recent years: *Employment Division, Department of Human Resources v. Smith*.[270] *Smith*, which sharply limited the applicability of the compelling state interest test in free exercise cases, stands apart from the Court's prior rulings on the free exercise clause and state benefits. Consequently, the *Smith* opinion has endured a barrage of criticism from the legal academy,[271] the media,[272] and Congress. Indeed, after repeated efforts,[273] Congress in November 1993 finally passed the Religious Freedom Restoration Act (RFRA), a statute intended in effect to overturn *Smith*. The interaction of this Act and the *Smith* decision will, in large measure, determine whether exemptions from civil rights laws will be required in the name of the free exercise of religion.

This Part argues that free exercise exemptions will continue to be generally unavailable from applications of antidiscrimination laws in the zone of commercial activity, and that conduct in the zone of traditional doctrinal transmission will continue to be largely shielded from such laws. In the region between these two zones—the realm of overlapping governmental and religious authority—the future is less certain. *Smith* asserts that the compelling state interest test does not govern this domain, whereas the Religious Freedom Restoration Act

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270 494 U.S. 872 (1990).

271 For but a small sampling, see, e.g., Leslie L. Dollen, Note, The Free Exercise Clause Redefined: The Eradication of Religious Liberties in *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 12 Hamline J. Pub. L. & Pol'y 143, 144 (1991) ("[I]n reaching its holding, the majority rewrote longstanding Free Exercise jurisprudence."); Rashelle Perry, Note, *Employment Division, Department of Human Resources v. Smith*: A Hallucinogenic Treatment of the Free Exercise Clause, 17 J. Contemp. L. 359, 359 (1991) ("[T]he *Smith II* Court engaged in a stilted and ultimately destructive interpretation of the Free Exercise Clause."); The Supreme Court, 1989 Term—Leading Cases, 104 Harv. L. Rev. 40, 198-99 (1990) (invoking Spanish inquisition and decrying "*Smith*'s sophistic disregard of decades of precedent mark[ing] the arrival of an activist Court characterized by inattention and even hostilities toward civil liberties"); id. at 208-09 ("*Smith* ignores precedent, contradicts an explicit finding of the federal government, destroys an entire religious faith without any corresponding benefit, and achieved a result contrary to the intent of the framers of the first amendment." (footnotes omitted)).

272 See, e.g., Church, State and Peyote, Wash. Post, Apr. 19, 1990, at A26; Rita Ciolli, Treading Upon Hallowed Ground; Court Rules Out Drug Ritual in Religious Ceremony, N.Y. Newsday, Apr. 18, 1990, News, at 15; Nat Hentoff, Justice Scalia v. The Free Exercise of Religion, Wash. Post, May 19, 1990, at A25; The Necessity of Religion: High Court Says Religious Freedom Is a Luxury—Wrong, L.A. Times, Apr. 19, 1990, at B6.

273 RFRA became law when the President signed "Religious Freedom Restoration Act of 1993," H.R. 1308, 103d Cong., 1st Sess. (1993). Previous versions of the bill included: "Religious Freedom Restoration Act of 1991," H.R. 2797, 102d Cong., 1st Sess. (1991); and "Religious Freedom Restoration Act of 1990," H.R. 5377, 101st Cong, 2d Sess. (1990).

insists on its application. Section A of this Part examines *Smith* and its effects on the various zones of free exercise protection. Proceeding on the assumption that RFRA is constitutional, Section B examines the Act and its declared effects in an attempt to identify the considerations that will determine the scope of permissible governmental regulation of middle zone activities.

A. *The Legacy of* Smith

Employment Division, Department of Human Resources v. Smith[274] involved two members of the Native American Church who challenged a denial of unemployment benefits on free exercise grounds. Alfred Smith and Galen Black were terminated from their jobs with a private drug rehabilitation center for ingesting peyote in a religious ritual, conduct that the Employment Division of Oregon determined constituted "work-related misconduct." Smith and Black sought judicial review, alleging that the free exercise clause constitutionally protected their sacramental use of peyote.[275]

The United States Supreme Court disagreed. The Court upheld the constitutionality of Oregon's peyote law in religious applications and, therefore, upheld the denial of unemployment compensation benefits.[276] The ensuing outrage over the decision focused perhaps less on the result than on the Court's reasoning.[277] By a bare five-member majority, the Supreme Court declared that the free exercise clause did not require application of compelling state interest analysis to laws alleged to conflict with sincerely held religious beliefs as long as those laws were "neutral" and "of general applicability." Justice Scalia's majority opinion rejected the compelling state interest test as

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274 494 U.S. 872 (1990).

275 See 494 U.S. at 874.

276 Id. at 890.

In 1988 in its first opinion in the case, the Court declared that the state could constitutionally deny Smith and Black benefits if its statute prohibited all peyote use without providing a religious exception and if such a blanket ban were constitutional. Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660, 672 (1988). Upon remand, the Oregon Supreme Court ruled that the state's criminal ban on peyote contained no such exception, 763 P.2d 146, 148 (1988), rev'd, 494 U.S. 872 (1990), and that, therefore employing compelling state interest analysis, the state's criminal law would be an unconstitutional infringement of free exercise rights if applied to sacramental peyote use. Id. at 150.

277 See Gerald V. Bradley, Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism, 20 Hofstra L. Rev. 245, 247 (1991) (describing Justice O'Connor's *Smith* concurrence as the "banner" of the many critics for whom "the majority's analysis, not the outcome, is 'the most important development in the law of religious freedom in decades'" (quoting Michael W. McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1111 (1990))); cf. Eisgruber & Sager, supra note 159, at 1245 ("Many aspects of the *Smith* decision have been sharply criticized, but none so much as the general view of religious exemptions announced by Justice Scalia's opinion for the Court.").

extending a presumption of religious exemption from neutral laws, which the opinion bombastically deemed a "luxury" the nation could not afford.[278]

For all its unequivocal rhetoric, however, the Court's opinion distinguished rather than overruled vast areas of precedent. Included were various cases upholding sacred liberties of belief and worship,[279] previous unemployment compensation cases,[280] and *Wisconsin v. Yoder*.[281] Many of these cases represented instances where the Court had applied compelling state interest analysis to laws that were arguably neutral and generally applicable.[282] The result was—as Justice Souter argued three years later in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*—"a free-exercise jurisprudence in tension with itself."[283]

Nonetheless, certain aspects of *Smith* are unremarkable. As Part II of this Note showed, commercial activities engaged in for religious purposes have been subjected to a distinctive variant of compelling state interest analysis. When deciding claims for free exercise exemption, the prong of the compelling interest test that asks whether less restrictive means might serve the government's interest is construed generously in the government's favor: If the full extent of the government's interest would not be served one hundred percent as effectively, no exemption is needed. Thus, under free exercise compelling

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278 See *Smith*, 494 U.S. at 888.

279 The Court wrote that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." Id. at 877. It then cited with approval: Torcaso v. Watkins, 367 U.S. 488, 496 (1961), which held unconstitutional a religious oath requirement for state officeholders; United States v. Ballard, 322 U.S. 78, 86-88 (1944), which held that the issue of the truth of religious beliefs could not be submitted to a jury in a fraud prosecution; McDaniel v. Paty, 435 U.S. 618, 629 (1978), which struck down a state provision singling out clergy for ineligibility for the state's constitutional convention; and Fowler v. Rhode Island, 345 U.S. 67, 69 (1953), which invalidated an ordinance that permitted church services in a public park but left enough interpretive discretion to allow prosecution of a Jehovah's Witness who addressed a gathering of witnesses and friends. *Smith*, 494 U.S. at 877.

280 *Smith*, 494 U.S. at 883 (citing Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981), Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987), and Sherbert v. Verner, 374 U.S. 398 (1963)).

281 406 U.S. 205 (1972) (distinguished in *Smith*, 494 U.S. at 881, as involving religious *and* parental rights).

282 See, e.g., *Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."); id. at 221 ("Where fundamental claims of religious freedom are at stake, . . . we must searchingly examine the interests that the State seeks to promote . . . ."); *Sherbert*, 374 U.S. at 406 ("We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right.").

283 Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2243 (1993) (Souter, J., concurring in part and concurring in the judgment).

state interest analysis, when religious organizations or adherents conduct themselves like businesses, the Constitution does not entitle them to exemptions from neutral, generally applicable regulations governing similar business enterprises. Hence, the *Smith* rule in effect leaves the interpretation of the free exercise clause in the commercial zone intact. The consequence with respect to the focus of this Note is evident; as one of the strongest advocates of free exercise exemptions has written, "the opinion in *Smith* is reasonably clear: Any well-drafted gay rights ordinance would be a facially neutral law of general applicability, and the Free Exercise Clause will not exempt religious organizations."[284]

Nor should *Smith* be read as appreciably affecting free exercise jurisprudence in the zone of doctrinal transmission (although this is less apparent than *Smith*'s impact in the commercial zone). Consider the rule that *Smith* announced: The free exercise clause does not *by itself* exempt anyone from neutral laws of general applicability.[285] This rejection of compelling state interest analysis for free exercise cases, far-reaching on its face, was qualified by the Court's suggestion that the free exercise clause might restrict the operation of neutral, generally applicable laws in contexts where other first amendment claims are viable. This was the gist of *Smith*'s partful announcement of a category of "hybrid" cases. In fact, the majority in *Smith* distinguished an entire string of cases, including *Cantwell v. Connecticut*,[286] *Murdock v. Pennsylvania*,[287] *Follett v. McCormick*,[288] and *Wisconsin v. Yoder*,[289] as "involv[ing] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."[290] In such "hybrid situation[s]",[291] free exercise compelling state interest analysis is still appropriate.

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284 Douglas Laycock, The Religious Freedom Restoration Act, 1993 B.Y.U. L. Rev. 221, 226. While Professor Laycock's conclusion applies not just to the commercial zone, but to other free exercise zones as well, it does not take into account the possibility, discussed immediately below, that *Smith* would have less force where hybrid rights are concerned.

285 See *Smith*, 494 U.S. at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the rights of parents . . . to direct the education of their children." (citations omitted)).

286 310 U.S. 296 (1940).

287 319 U.S. 105 (1943).

288 321 U.S. 573 (1944).

289 406 U.S. 205 (1972).

290 Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 881 (1990).

291 Id. at 882.

In contrast, Smith and Black, in the Court's view, had offered "no contention that Oregon's drug law represent[ed] an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs."[292] For this reason, the free exercise clause did not exempt their conduct from governmental prohibition, or even require the law to survive compelling interest analysis. Use of peyote itself did not involve propagation of religious doctrine and belief through spoken or printed word or group assembly.[293] Thus, although it was of no help to Smith or Black, the *Smith* rule with its "hybrid" exception, properly read in light of the Court's existing free exercise jurisprudence and the nation's historical commitment to freedom of worship, does not extend to conduct protected by the zone of doctrinal transmission, that is, to those first amendment type activities engaged in to propagate religious doctrine, such as preaching, disseminating literature, and group worship.

The fact that the Court's new analysis in *Smith* was not strictly needed to reach its conclusion does not necessarily render the rule dictum.[294] Proceeding on the assumption that the Court will continue to adhere to *Smith*,[295] the best reading of the opinion, the one most consonant with the Court's discussion of neutral laws of general applicability, is that, in the absence of religious persecution, compelling state interest analysis applies only in the doctrinal transmission zone

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292 Id.

293 The peyote ritual might be viewed as conduct, for its practitioners believe it to be the means by which they commune with their deity. See *Smith*, 494 U.S. at 919 (Blackmun, J., dissenting). Current free speech/press clause doctrine does not, however, regard government regulation of expressive conduct with the same high degree of suspicion reserved for direct regulation of verbal and printed speech, requiring not a "compelling" governmental interest but rather an "important or substantial governmental interest" that is "unrelated to the suppression of free expression." United States v. O'Brien, 391 U.S. 367, 377 (1968); see also Texas v. Johnson, 491 U.S. 397, 403 (1989); William L. Montague, Jr., Employment Division v. Smith: Overlooking the Middle Ground in Free Exercise Analysis, 80 Ky. L.J. 531, 551 (1992); Robert Kamenshine, Scrapping Strict Review in Free Exercise Cases, 4 Const. Commentary 147, 154 (1987). One should therefore not be shocked by the Supreme Court's disinclination to extend free exercise compelling interest analysis to expressive religious conduct. Nevertheless, it is noteworthy that the Court does not even find the free exercise clause implicated by neutral and generally applicable laws that restrict such conduct.

294 See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2247 (1993) (Souter, J., concurring in part and concurring in the judgment) ("*While I am not suggesting that the* Smith *Court lacked the power to announce its rule,* I think a rule of law unnecessary to the outcome of a case, especially one not put into play by the parties, *approaches* without more the sort of 'dicta . . . which may be followed if sufficiently persuasive but which are not controlling.'" (emphases added) (quoting Humphrey's Executor v. United States, 295 U.S. 602, 627 (1935))).

295 In his concurrence in *Hialeah*, Justice Souter advised that *Smith* should be revisited. Id. at 2240 (Souter, J., concurring in part and concurring in the judgment).

(where "hybrid" cases fall). If this is so, the Court's much criticized distinctions of its prior cases might not suffice to preserve the analytic framework of these precedents. In particular, "middle zone" cases like *Wisconsin v. Yoder*, although not explicitly overruled by *Smith*, would no longer be subject to compelling state interest analysis (unless religious persecution concerns are implicated); therefore, such cases would probably come out differently under *Smith*.[296] Hence, the results in *Bob Jones University* (a middle zone case denying an exemption, where compelling state interest analysis would now be inapplicable) and *Braunfeld* (a commercial zone case that denied an exemption) would remain good law, and *Yoder* (another middle zone case, but one applying compelling state interest analysis and granting an exemption from a neutral, generally applicable law) and its reasoning would not be.[297]

This analysis maintains that *Smith* left the commercial and doctrinal transmission zones alone, and extended the rule of the commercial zone to the middle zone. If this reading of *Smith* is correct, then antidiscrimination statutes will nearly always automatically survive free exercise challenges. The exception would be the—one hopes—rare instance in which someone attempted enforcement at the expense of interests protected by the doctrinal transmission zone, for example, by trying to coerce a church to refrain from discriminating in its selection of ministers.

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[296] There is a striking parallel here between *Smith* and *Sherbert*. See Hamilton, supra note 4, at 723 n.38 (citing Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1, 1.). *Smith* has been criticized as overturning settled free exercise doctrine. See, e.g., Laycock, supra ("The Court sharply changed existing law . . . ."). *Sherbert* has also been criticized as turning free exercise jurisprudence on its head. See, e.g., Mayer G. Freed & Daniel D. Polsby, Race, Religion, and Public Policy: Bob Jones Univ. v. United States, 1983 Sup. Ct. Rev. 1, 21 ("[I]n 1963 the Court stood its previous free exercise law on its head . . . . [i]n *Sherbert v. Verner* . . . ." (citing 374 U.S. 398 (1963))). *Smith* did not expressly overrule *Sherbert* even while casting grave doubt on its viability as anything more than an antipersecution case. See, e.g., *Smith*, 494 U.S. at 921 (Blackmun, J., dissenting) ("[T]he State's regulatory interest in denying benefits for religiously motivated 'misconduct,' . . . is indistinguishable from the state interests this Court has rejected in *Frazee*, *Hobbie*, *Thomas*, and *Sherbert*." (citations omitted)). *Sherbert*, while not expressly overruling *Braunfeld v. Brown*, called it into question. See, e.g., *Sherbert*, 374 U.S. at 418 (Stewart, J., concurring in the result) ("[I]n order to reach this conclusion the Court must explicitly reject the reasoning of *Braunfeld v. Brown*.").

[297] Because *Sherbert* and its progeny represent instances of the antipersecution principle to generally applicable statutory schemes, compelling state interest analysis in similar cases would still be proper on that basis.

B. *The Promise of RFRA?*

In response to the highly criticized decision in *Smith*, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA).[298] This Section considers the effects that RFRA might have on claims for free exercise exemptions. First, it briefly discusses the purpose of the statute, as well as Congress's constitutional authority to enact it. Then, assuming that RFRA is a proper exercise of Congress's legislative power, this Section considers the likely interpretation of the Act as applied to laws prohibiting discrimination on the basis of sexual orientation.

1. *The Act's Purpose and Foundation*

The declared purposes of RFRA are

> to restore the compelling interest test as set forth in *Sherbert v. Verner*[299] . . . and *Wisconsin v. Yoder*,[300] . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and . . . to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[301]

Specifically, the Act provides that

> [g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . if it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest.[302]

RFRA is sweeping in its scope. "Government" refers to "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State."[303] The Act purportedly applies to "all Federal and State law" and to all implementations of law, statutory or otherwise, both preceding and postdating the Act's enactment.[304]

Indeed, RFRA may be too sweeping. Although the Act may evince a laudable commitment on Congress's part to protecting reli-

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298 Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V. 1993)).

299 374 U.S. 398 (1963).

300 406 U.S. 205 (1972).

301 § 2(b), 107 Stat. at 1488.

302 42 U.S.C. § 2000bb-1(a) & (b) (Supp. V 1993).

303 Id. § 2000bb-2(1).

304 Id. § 2000bb-3(a).

gious freedom in America,[305] there is a serious question as to the statute's constitutionality.[306] The Act is vulnerable to challenge on the grounds that it exceeds Congress's power to enforce the fourteenth amendment,[307] that it violates constitutional principles of religious freedom,[308] and that it represents an impermissible legislative attempt to overrule a constitutional judgment of the Supreme Court.[309] If RFRA is not a constitutional exercise of Congressional authority, *Smith* remains the law of the land, and, as the foregoing analysis shows, most laws prohibiting discrimination on the basis of sexual orientation would likely survive free exercise challenge.

2. *The Act's Potential Effects*

Although RFRA may be constitutionally infirm, it is still necessary at this juncture to try to understand what the Act means for laws prohibiting sexual orientation discrimination. Despite the likelihood

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[305] But see Marci Hamilton, The Religious Freedom Restoration Act: Letting the Fox into the Henhouse under Cover of Section 5 of the Fourteenth Amendment, 16 Cardozo L. Rev. 357, 381 n.7, 384-85 & n.101 (1994) (suggesting that Congress in enacting RFRA was not deeply concerned with protecting religious liberty).

[306] See generally id.; see also, e.g., Germantown Seventh Day Adventist Church v. City of Philadelphia, Civ. A. No. 94-1633, 1994 WL 470191, at *2 n.1 (E.D. Pa. Aug. 26, 1994) ("Neither plaintiff nor defendant has noted the possible applicability of [RFRA] to plaintiff's claims, and its constitutionality is not in issue.").

[307] See Christopher L. Eisgruber & Lawrence G. Sager, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437, 444, 461-70 (1994); cf. Canedy v. Boardman, 16 F.3d 183, 186 n.2 (7th Cir. 1994) ("The constitutionality of [RFRA] . . . raises a number of questions involving the extent of Congress's powers under Section 5 of the Fourteenth Amendment.").

The power of Congress may be vast, see, e.g., Wickard v. Filburn, 317 U.S. 111, 124 (1942) (upholding statute regulating local wheat consumption as within scope of Congress's plenary commerce power), but it is not unlimited. The sweeping clause of the Constitution, U.S. Const. art. I, § 8, cl. 18, grants Congress broad power to pass laws to effectuate its enumerated powers: "The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Where the Constitution does not grant a particular power, however, Congress may not legislate. The question as to what enumerated power of Congress authorizes it to enact RFRA has been the subject of much scholarly commentary. See, e.g., Laycock, supra note 284, at 245-54 (discussing congressional power under § 5 of the fourteenth amendment, the limits on that power, and the reasons why he believes RFRA does not violate these limitations); Eisgruber & Sager, supra note 159, at 1306 ("[T]he Act is certainly unwise and perhaps unconstitutional."); id. at 1308-11 (surveying several constitutional objections to the Act); see generally Hamilton, supra note 305.

[308] See Eisgruber & Sager, supra note 307, at 444, 452-60.

[309] See id. at 444-45, 470-74; cf. Allah v. Beyer, No. CIV. 92-0651(GEB), 1994 WL 549614, at *7 n.1 (D.N.J. Mar. 29, 1994) ("While the constitutionality of Congress' attempt to dictate to the Supreme Court that it must reject its current interpretation of the First Amendment's Free Exercise Clause in favor of a prior interpretation is questionable, this issue has not been raised here and we need not consider it.").

that the Supreme Court will ultimately hold that the Act is not a proper exercise of Congress's enforcement power, lower courts have begun applying RFRA to resolve free exercise claims.[310] Thus, predicting the outcome of the free exercise challenges that form the focus of this Note first requires an exercise in statutory construction, a difficult task in light of the imprecise drafting of RFRA.

RFRA does not require government to grant each and every sincere religious claim for exemption. Rather, it only enjoins government not to "*substantially burden* a person's exercise of religion."[311] This key term remains undefined in the Act.[312] Therefore, a court adjudicating a RFRA challenge to a law proscribing discrimination on the basis of sexual orientation must look to the case law. As Professor Ira Lupu has demonstrated, "[p]revailing judicial approaches to defining what constitutes a legally cognizable burden on religious exercise . . . leave much to be desired."[313]

If, however, as the Supreme Court has suggested, a "tendency to coerce individuals into acting contrary to their religious beliefs"[314] is the constitutional measure of burden,[315] religious claimants challenging applications of laws against sexual orientation discrimination will likely meet the threshold requirement of showing a burden. Where persons face a choice between hiring, serving, or teaching gay men,

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310 See, e.g., Bryant v. Gomez, 46 F.3d 948, 949-50 (9th Cir. 1995) (per curiam) (upholding grant of summary judgment to prison defendants, holding that prisoner failed to establish that prison's failure to hold full Pentecostal services constituted a "substantial burden"); *Allah*, 1994 WL 549614 at *5-7 (finding under RFRA no likelihood of success on the merits of prisoner's challenge to proposed interstate transfer).

311 42 U.S.C. § 2000bb-1(a) (Supp. V 1993) (emphasis added).

312 The House and Senate reports both indicate that the term is referential and "that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened." H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) [hereinafter, House Report]. The Senate report contains nearly identical language. S. Rep. No. 111, 103d Cong., 1st Sess. 8 (1993) [hereinafter Senate Report]; see also 1993 U.S.C.C.A.N. 1892, 1898 (reprinting Senate Report). The Senate report apparently interprets the case law to distinguish substantial burdens from "government action that may have some incidental effect on religious institutions" and from "government actions involving only management of internal Government affairs or the use of the Government's own property or resources." Senate Report, supra, at 9, reprinted in 1993 U.S.C.C.A.N. at 1898. The Senate Report also suggests that "reasonable time, place, and manner restrictions" on speech cannot constitute a substantial burden on the exercise of religion. See id. at 13, reprinted in 1993 U.S.C.C.A.N. at 1903 (stating that "where religious exercise involves speech . . . reasonable time, place, and manner restrictions are permissible consistent with first amendment jurisprudence").

313 Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 965 (1989).

314 Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988).

315 Of course, since the challenged governmental action in *Lyng* was found to have no coercive tendency, such tendency may be a necessary condition, but not a sufficient one, for demonstrating a substantial burden on religious exercise.

lesbians, and bisexuals in opposition to their religious beliefs, or giving up their businesses or schools, it is reasonable to perceive a coercive tendency in the application of civil rights laws. Where the stakes for the religious adherent are as high as in these examples, it is also reasonably likely that the burden would count as substantial, although "substantial burden" is not a free exercise term that the Court has explicitly defined.

Whatever the precise contours of a "substantial burden," it is unlikely that the mere *existence* of a law prohibiting sexual orientation discrimination can constitute a substantial burden on religion. If RFRA is enforceable (as this Section of the Note assumes arguendo), it will prevent actions and restrictions that pose real, "substantial" burdens on religious adherents. It would therefore be inappropriate to convert RFRA into a font of facial challenges to antidiscrimination laws in advance of realistic threats of enforcement. Particularly since the Act is cast in terms of "*application* of [a] burden to a person,"[316] RFRA should not be used routinely to ground declaratory judgments concerning the alleged invalidity of civil rights measures. If a religious adherent has not discriminated against identifiable persons in violation of antidiscrimination statutes, those laws should not be held to impose a "substantial burden" on the adherent.

RFRA's terms also restrict government from burdening "a person's *exercise of religion*."[317] Here, Congress has provided only a referential definition of this term. The Act specifies that "exercise of religion" refers to "the exercise of religion under the First Amendment to the Constitution,"[318] which suggests that all, and only, activities potentially protected under the religion clauses of the Constitution are protected by RFRA. Lacking any sort of enumeration of, or test for, these activities, RFRA must be understood to refer to the accumulated case law governing the religion clauses. Of course, since the Supreme Court has been appropriately loath to define "religion" for constitutional purposes,[319] the case law offers limited guidance as to the statute's meaning. As with constitutional free exercise claims, presumably any sincere assertion that a particular act or abstention is a matter of religious faith[320] suffices to establish that the act or absten-

316 42 U.S.C. § 2000bb-1(b) (Supp. V. 1993) (emphasis added).

317 Id. § 2000bb-1(a) (emphasis added).

318 Id. § 2000bb-2(4).

319 See, e.g., Arlin M. Adams & Charles J. Emmerlich, A Heritage of Religious Liberty, 137 U. Pa. L. Rev. 1559, 1665 (1989) ("The Supreme Court has not defined religion for constitutional purposes . . . .").

320 This phraseology is not intended to mean that a person's religion must *require* (or *prohibit*) a particular action for conduct to constitute "the exercise of religion" potentially protected by RFRA. Cf. Laycock, supra note 297, at 23-28 (discussing Court's "conception

tion constitutes the exercise of religion.[321] And religious objections to laws prohibiting sexual orientation discrimination will, as discussed earlier,[322] almost invariably be ruled sincere.

A finding of sincerity will not, however, guarantee that religious objectors to civil rights laws will prevail, even where the burden is deemed "substantial," for RFRA is not an absolute prohibition against such laws. Where application of a civil rights law substantially burdens a person's exercise of religion, government will be put to its proof. To sustain its antidiscrimination laws against religious challenges under RFRA, government will need to demonstrate "that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering" that interest.[323]

This is precisely where the sharpest contention is likely to arise in cases invoking RFRA to challenge laws prohibiting sexual orientation discrimination. The statute does not define "compelling governmental interest";[324] indeed, Congress rejected language that would have enumerated classes of compelling interests.[325] Nor does the Act define what relation between burden and governmental interest is denoted by "in furtherance of," or how that relation interacts with the "least restrictive means" requirement. These concepts, then, may

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of religion as obeying the rules" and suggesting that a limitation of constitutional protection solely to religious mandates would be overly narrow). Rather, a person invoking RFRA should have to show only that she has a religious reason for desiring to engage in or refrain from particular conduct.

321 As with free exercise claims under the Constitution, government may be expected to concede that many RFRA claims are sincerely religious, while courts in the end may be expected to dismiss a nontrivial number of RFRA claims as insincere.

322 See text accompanying note 110 supra.

323 42 U.S.C. § 2000bb-1(b) (Supp. V 1993).

324 As one commentator has noted, "[c]ontrary to some assertions in the legislative history, the phrase 'compelling state interest' does not have any set legal definition." Allan Ides, The Text of the Free Exercise Clause as a Measure of *Employment Division v. Smith* and the Religious Freedom Restoration Act, 51 Wash. & Lee L. Rev. 135, 154 n.51 (1994).

325 An amendment not adopted by a House Subcommittee would have defined the term "compelling state interest" as:

> an interest in the nondiscriminatory enforcement of generally applicable and otherwise valid civil or criminal law directed to: (a) the protection of an individual from death or serious bodily harm, (b) the protection of the public health from identifiable risks of infection or other public health hazards, (c) the protection of private or public property, (d) the protection of individuals from abuse or neglect, or discrimination on the basis of race or national origin, or (e) the protection of national security, including the maintenance of discipline in the Armed Forces of the United States.

House Report, supra note 312, at 16-17 n.6 (additional views of Hon. Henry J. Hyde) (internal quotation marks omitted). Congress's refusal in RFRA to limit "compelling" antidiscrimination interests to those protecting individuals from race or national origin discrimination merits particular attention, for it suggests that Congress did *not* agree to render religious interests superior to all other antidiscrimination laws.

prove more difficult for courts to apply (if they uphold RFRA) than the ones so far discussed.

As concerns the relationship between a governmental action or statute and a governmental interest, "in furtherance of a compelling government interest" must be interpreted as expressing a relation different from that embodied in the "strict scrutiny" of traditional equal protection doctrine. For example, governmental actions drawing racial distinctions will survive equal protection challenge only if they are "necessary" for a "compelling governmental interest."[326] The language of RFRA, however, denotes a relationship substantially less restrictive than "necessity." By using such broad language—"in furtherance of"—RFRA signals that challenged laws must be appropriate or suitable for advancing compelling governmental interests.

Any law prohibiting some form of discrimination in education, employment, housing, or public accommodations furthers the governmental interest in ensuring that its citizenry has full access to publicly available goods, services, and opportunities. Indeed, antidiscrimination provisions serve not ouly a general governmental interest in ensuring access but also a "transactional" interest in prohibiting individual "acts of discrimination as independent social evils."[327] Therefore, antidiscrimination laws in general, and laws prohibiting sexual orientation discrimination in particular, are "in furtherance of" governmental interests.

Moreover, government's interests in prohibiting discrimination are, the Supreme Court has taught, "compelling."[328] Laws that prohibit discrimination in generally available goods or services guarantee "equal enjoyment of privileges of a quasi public character."[329] As the Supreme Court has explained, they target "unique evils that government has a compelling interest to prevent."[330] These laws "encourage and cultivate a spirit which will make [the protected individuals] self-respecting, contented, and loyal citizens, and give them a fair chance

326 See, e.g., Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) ("[Race-based] classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of [that] legitimate purpose." (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964))); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 262 (1974) ("[A durational residency classification], 'unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.'" (emphasis omitted) (quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969))).

327 Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282-83 (Alaska), cert. denied, 115 S. Ct. 460 (1994).

328 See text accompanying note 59 supra.

329 People v. King, 18 N.E. 245, 248 (N.Y. 1888) (italics omitted).

330 Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984).

in the struggle of life."[331] The remedial aspects of such laws—in Congress's words—"vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public accommodations.'"[332] All of this is true whether a statute proscribes discrimination on the basis of race, sex, religion, or sexual orientation. Accordingly, laws prohibiting sexual orientation discrimination, like other provisions in civil rights statutes, do in general serve compelling state interests.[333]

But might there be circumstances in which the nature of the governmental interest in prohibiting discrimination is diminished? Although not a perfect fit, the zones of free exercise protection suggest an answer to this question. Part II.A showed that governmental authority is at its zenith, and religious authority at its nadir, in the commercial zone. Thus, as Justice O'Connor wrote in concurrence in *Roberts v. United States Jaycees*,[334] courts should focus on the commercial aspects of those who claim protection for their discriminatory practices:

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331 *King*, 18 N.E. at 248.

332 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (quoting S. Rep. No. 872, 88th Cong., 2d Sess. 16-17 (1964)).

333 A common argument against laws forbidding sexual orientation discrimination asserts that such laws are unnecessary, citing various studies purporting to show that gay men and lesbians are as a class well-educated and affluent. See, e.g., Duncan, supra note 11, at 407-09 (discussing economic affluence of gays and lesbians). This argument overlooks the sampling and self-reporting problems inherent in surveying an often reviled population widely accustomed to hiding what is here the pertinent facet of its identity. But more fundamentally, this argument mistakes the purpose of modern civil rights legislation. While it may be true that "[t]he primary purpose of our Nation's civil rights laws prohibiting racial discrimination was to remedy the severe economic deprivation caused by pervasive discrimination against blacks and other racial minorities," id. at 406—although the inclusion of "other minorities" makes even this statement suspect as a statement of historical fact—few would suggest today that white Episcopalians, for example, should be removed from the rolls of the protected because they are *as a group* well-educated and well off. Today, civil rights laws are concerned in large measure with protecting *individuals* from discrimination on grounds unrelated to their *abilities*. See, e.g., Connecticut v. Teal, 457 U.S. 440, 453-54 (1982) ("[T]he principal focus of [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole."), quoted in Peter B. Bayer, Rationality—and the Irrational Underinclusiveness of the Civil Rights Laws, 45 Wash. & Lee L. Rev. 1, 80 (1988); see also Bayer, supra, at 52 ("First and foremost, civil rights statutes are drafted to protect individual dignity."); id. at 89-90 ("[I]ndividuals' sexual preferences have nothing to do with—are no index of—their *ability* to perform a given job, be a peaceful and orderly tenant, fulfill a contract or enjoy a public accommodation." (emphasis added)). This point is often studiously ignored by opponents of laws prohibiting sexual orientation discrimination. See, e.g., Duncan, supra note 11, at 435-36 (improperly relying on Supreme Court discussion of the irrelevance of gender to "capacities" and "actual abilities" to support claim that Court was motivated by irrelevance of gender to both "*character* and aptitude" (emphasis added)).

334 468 U.S. 609 (1984).

> [T]he State is free to impose *any* rational regulation on *the commercial transaction* itself. The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has *no* constitutional right to deal only with persons of one sex.[335]

Religious organizations and individuals possess essentially no rights to discriminate in quasi-commercial activities, and antidiscrimination laws are subject to the commercial zone distribution of authority, which locates plenary regulatory authority with government. The interests served by such civil rights laws are therefore most compelling in this zone, for government's authority here is not diluted by being shared in any appreciable measure with religious actors.

In contrast, Part II.B demonstrated that where the religious conduct at issue falls within the doctrinal transmission zone (characterized by the affinity of the conduct to other forms of conduct protected by the first amendment), the distribution of authority between government and religion is almost wholly reversed. Government is virtually devoid of regulatory authority over the conduct coming within this zone, and primary authority is vested in religious individuals and communities. As a result, although a governmental interest in eliminating sexual orientation discrimination is generally compelling, the targeted harms are not so overbearing that they would suffice to upset the constitutional balance of authority. Accordingly, application of antidiscrimination laws in the doctrinal transmission zone should be held not to serve a compelling governmental interest within the meaning of RFRA.

As Part II.C discussed, the Constitution reasonably respects the substantial authority over middle zone activity shared by both governmental and religious actors. But as suggested by the Court's strong emphasis on government's regulatory authority in cases such as *Wisconsin v. Yoder*,[336] the governmental interests at stake in the middle zone are not accorded reduced significance by virtue of this shared distribution of authority. Thus, antidiscrimination statutes should be held to serve compelling governmental interests even in the middle zone.

Finally, unlike some of the cases surveyed in Part II of this Note, civil rights laws pose few difficult questions about the selection of least restrictive means. If government wants to reduce or eliminate dis-

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335 Roberts v. United States Jaycees, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) (emphases added) (agreeing with the majority decision except for its analysis of freedom of expressive association).

336 See notes 166-70 and accompanying text supra.

crimination, the most effective means at its disposal is to prohibit discrimination. This is true of a general governmental interest in eliminating discrimination, but it is particularly true of the interest in proscribing transactional discrimination. As just discussed with reference to compelling state interests, however, government has no cognizable interest in proscribing discrimination in the constitutionally sheltered zone of purely religious speech and association. Aside from the somewhat irrelevant example of discriminatory conduct occurring within the doctrinal transmission zone (for this is generally unregulable), any exemptions (whether demanded or already enacted) would mean that government is restricted in its efforts to reduce discrimination. Thus, the government's interest in combatting discrimination in the commercial and middle zones could not be equally served by less restrictive means than antidiscrimination laws. Accordingly, laws prohibiting sexual orientation discrimination meet the requirements of RFRA outside the zone of doctrinal transmission, and religious exemptions will not be forthcoming even from courts that uphold the constitutionality of RFRA.

3. *Summary*

If RFRA is not found unconstitutional, it will do no more than the free exercise zones to limit the effectiveness of laws prohibiting discrimination on the basis of sexual orientation. Like other types of civil rights laws, laws against sexual orientation discrimination will not be applicable to religious discrimination within the zone of doctrinal transmission. However, even if such laws were drafted in a fashion that might apply to doctrinal zone activity, religiously motivated discrimination in this zone would be protected under both existing free exercise jurisprudence and RFRA. Both constitutionally and statutorily, government has no cognizable interest in interdicting discrimination on any basis in proselytizing, or in purely private, religious assembly.[337]

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337 Cf. 139 Cong. Rec. S2822 (daily ed. Mar. 11, 1993) (remarks of Sen. Kennedy on introducing the Religious Freedom Restoration Act of 1993) ("As a result of the Smith decision, it has been suggested that Government could regulate the selection of priests and ministers . . . ."). Although this Note argues that *Smith* does *not* countenance such a result, it agrees with Senator Kennedy that such a prospect would constitute an intolerable "threat to religious freedom," id., and thus disagrees with Professor Lupu's narrower conclusions about the associational rights of religious institutions. See Ira C. Lupu, Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination, 67 B.U. L. Rev. 391, 439 (1987) ("[Religious] associations may exclude from employment opportunities members of groups marked for protection by civil rights laws if and only if members of those groups are also barred from membership in the church." (emphasis omitted)).

In contrast, neither the Constitution nor RFRA exempts religiously motivated discrimination in the commercial zone from laws prohibiting sexual orientation discrimination. Government is free to regulate in this zone, and the religious reason for an individual's or organization's discriminatory act does not take the conduct out of this realm or the scope of any otherwise applicable antidiscrimination laws.

In the middle, where cognizable governmental regulatory interests and religious interest in transmitting doctrine overlap, the determinative constitutional and statutory question is whether, in light of the religious privacy interests at stake, government has a compelling interest in proscribing discrimination in the particular activity at issue. Where religiously motivated discrimination occurs in the confines of an exclusive religious community that imposes rigorous doctrinal demands on its adherents (so that it is undeniable that the relevant community is defined solely in religious terms), and where the discrimination occurs with respect to a position or function involving the dissemination of religious belief, constitutional privacy concerns may prevent a state's antidiscrimination interests from reaching constitutionally "compelling" status. Where that is not the case, however, religion is not a shield against the enforcement of an otherwise valid law prohibiting discrimination on the basis of sexual orientation.

CONCLUSION

With local governments increasingly taking a stand against discrimination on the basis of sexual orientation in employment, housing, and public accommodations, the potential for conflicts between civil rights laws and conscientiously held religious beliefs continues to expand. This Note has attempted to elaborate from the Supreme Court's free exercise jurisprudence a taxonomy that might help predict the ability of civil rights laws to withstand religious challenges, whether brought under the Constitution directly or under the constitutionally questionable Religious Freedom Restoration Act. In time order may emerge, but this possibility depends upon the ability of the nation—through its courts and legislatures, its governors and citizens—to articulate a coherent vision of the role of religious and secular convictions and dissent in our diverse and pluralistic society. The contours of this vision will reveal the true measure of the American people's foundational commitments to liberty and equality.